

AD-A283 382**TATION PAGE**
Form Approved
OMB No. 0704-0188

3 to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and maintaining the collection of information. Send comments regarding this burden estimate or any other aspect of this collection to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank) **2. REPORT DATE** **3. REPORT TYPE AND DATES COVERED**
 1. *Sep 94* 3. **REPORT TYPE AND DATES COVERED**
4. TITLE AND SUBTITLE

Authority of States to Use Section 401 Water Quality Certification to Deny or Condition Federal Energy Regulatory Commission Licences

5. FUNDING NUMBERS
6. AUTHOR(S)

Erich Odmar Hart

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

AFIT Students Attending:

8. PERFORMING ORGANIZATION REPORT NUMBER

AFIT/CI/CIA

George Washington University

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)

DEPARTMENT OF THE AIR FORCE
 AFIT/CI
 2950 P STREET
 WRIGHT-PATTERSON AFB OH 45433-7765

10. SPONSORING/MONITORING AGENCY REPORT NUMBER

94-119

11. SUPPLEMENTARY NOTES**12a. DISTRIBUTION/AVAILABILITY STATEMENT**

Approved for Public Release IAW 190-1
 Distribution Unlimited
 MICHAEL M. BRICKER, SMSgt, USAF
 Chief Administration

12b. DISTRIBUTION CODE**13. ABSTRACT (Maximum 200 words)****14. SUBJECT TERMS****15. NUMBER OF PAGES**

103

16. PRICE CODE**17. SECURITY CLASSIFICATION OF REPORT****18. SECURITY CLASSIFICATION OF THIS PAGE****19. SECURITY CLASSIFICATION OF ABSTRACT****20. LIMITATION OF ABSTRACT**

94-119

**AUTHORITY OF STATES TO USE SECTION 401
WATER QUALITY CERTIFICATION TO DENY OR CONDITION
FEDERAL ENERGY REGULATORY COMMISSION LICENSES**

By

Erich Odmar Hart

B.A., May 1976, University of Arizona
J.D., May 1980, University of Arizona Law School

A Thesis submitted to

The Faculty of

The National Law Center

of The George Washington University
in partial satisfaction of the requirements
for the degree of Master of Laws

September 30, 1994

Thesis directed by
Laurent R. Hourclé
Professor of Law

Accesion For	
NTIS	CRA&I
DTIC	TAB
Unannounced	
Justification	
By _____	
Distribution /	
Availability Codes	
Dist	Avail and / or Special
A-1	

94-26431



10705

94 8 18 1 28

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT	4
A. THE ELKHORN HYDROELECTRIC PROJECT	8
B. STATUTORY AND REGULATORY BACKGROUND	10
1. The Federal Power Act	10
2. The Clean Water Act	15
3. EPA Regulations Implementing Water Quality	21
4. Pertinent State of Washington Statutes and Regulations ..	22
III. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS BELOW	24
A. ADMINISTRATIVE PROCEEDINGS	24
B. JUDICIAL PROCEEDINGS	27
1. Superior Court	27
2. The Supreme Court of Washington	28
IV. ISSUES BEFORE THE U.S. SUPREME COURT	35
A. WHETHER THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE CERTIFICATION AUTHORITY GRANTED TO THE STATES IN SECTION 401 OF THE CLEAN WATER ACT IS INCONSISTENT WITH CONGRESS' GRANT OF AUTHORITY TO FERC IN THE FEDERAL POWER ACT.	35
1. Petitioners' Position	35
2. Respondents' Position	41
3. The Supreme Court Majority Opinion	48

B. WHETHER STATE CERTIFICATION AUTHORITY UNDER CWA SECTION 401 IS LIMITED TO DETERMINING WHETHER DISCHARGES FROM FEDERALLY LICENSED HYDROELECTRIC FACILITIES COMPLY WITH EPA-APPROVED WATER QUALITY STANDARDS AND OTHER LIMITATIONS LISTED IN SECTION 401.	53
1. Petitioners' Position	53
2. Respondents' Position	63
3. The Supreme Court Opinion	71
C. WHETHER CWA SECTION 303 REQUIRES THE STATE TO PROTECT DESIGNATED USES SOLELY THROUGH IMPLEMENTATION OF SPECIFIC CRITERIA, NOT USES.	76
1. Petitioners' Position	76
2. Respondents' Position	78
3. The Supreme Court	80
V. SUMMARY OF THE ISSUES	84
VI. IMPACTS OF THE CASE	95
VII. CONCLUSION	103

**AUTHORITY OF STATES TO USE SECTION 401
WATER QUALITY CERTIFICATION TO DENY OR CONDITION
FEDERAL ENERGY REGULATORY COMMISSION LICENSES**

I. INTRODUCTION

This thesis discusses a recent United States Supreme Court case that will have a profound influence on the licensure of hydroelectric projects and the related ability of States to protect the quality of their waters.¹ On October 4, 1993, the Supreme Court granted a Writ of Certiorari² to resolve a conflict among the state courts of last resort.³

This case involves two fundamental and competing national interests: the nation's thirst for cheap, dependable power versus its equally strong desire to improve the quality of its water resources. It also involves two underlying regulatory regimes that overlap and conflict with each other in some ways. This case illustrates how those two national interests and their underlying regulatory regimes cannot always be reconciled. It also demonstrates how Congress, with its

¹The case is PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology, et al., ___ U.S. ___, 114 S.Ct. 1900 (1994), hereinafter PUD No. 1. On May 31, 1994, the Supreme Court issued its opinion: Justice O'Connor delivered the opinion of the Court in which Chief Justice Rehnquist, and Justices Blackmun, Stevens, Kennedy, Souter, and Ginsburg joined. Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

²510 U.S. ___, 114 S.Ct. 55, 126 L.Ed.2d 25 (1993).

³PUD No. 1, 114 S.Ct. at 1908.

muddled ways of passing legislation, can create conflicts between federal and state regulatory agencies.

Hydroelectric power projects may have significant negative effects on water resources.⁴ For example, dams might cause drops in flow that concentrate wastes discharged into a river to unacceptable levels.⁵ In addition, dams may effect chemical changes to rivers such as lowering dissolved oxygen levels, changing the levels of nutrients and minerals, trapping sediment, etc.⁶ On the other hand, hydroelectric power projects provide 12% of the energy capacity in the United States.⁷ They also are among the least expensive sources of electricity.⁸

The thesis first details the factual background of this important case. Then the underpinning statutory and regulatory provisions are explored. That is important because the litigation over the Elkhorn Hydroelectric project boils down

⁴See Alison M. DesMeules and Cynthia Parks, "Hydropower in Vermont, An Assessment of Environmental Problems and Opportunities," Vermont Agency of Natural Resources (May 1988).

⁵Id.

⁶National Wildlife Federation v. Gorsuch, 693 F.2d 156, 161-164 (D.C. Cir. 1982).

⁷Edison Electric Inst. Statistical Yearbook of the Electric Utility Industry/1991, No. 59, Table 2, p. 8 (EEI, Washington, D.C., 1992).

⁸Id.

to a matter of statutory interpretation by the judiciary. The litigation is next tracked through the State of Washington administrative and State court proceedings.

The key issues are then individually discussed, first from the petitioners' viewpoint and then from the perspective of the respondents and the United States Supreme Court. Finally, the possible ramifications of this landmark case are covered.

United States filed a brief as *amicus curiae* supporting Respondents¹² as did 44 of the 50 states¹³ and a group of environmental organizations.¹⁴

Oral argument was held before the Supreme Court of the United States on 23 February 1994. The Court decided the case on May 31, 1994, holding that the State of Washington's minimum stream flow requirement is a permissible condition of a Clean Water Act § 401 certification.¹⁵

In this case, the public utility district and Tacoma planned to build the Elkhorn Hydroelectric Project on the Dosewallips River in the State of Washington. They applied for a license from FERC as required by § 4(e) of the Federal Power

¹²Brief for the United States as *Amicus Curiae* Supporting Affirmance, PUD No. 1, 114 S.Ct. 1900 (1994)(No. 92-1911).

¹³Brief for *Amici Curiae* States of Vermont, New York, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming In Support of Respondents, PUD No. 1, 114 S.Ct. 1900 (1994)(No. 92-1911).

¹⁴Brief of *Amici Curiae*, American Rivers, the American Fisheries Society, the Coast Range Association, the Conservation Law Foundation, the Federation of Fly Fishers, Friends of the Earth, the National Audubon Society, the Natural Resources Defense Council, New York Rivers United, the Olympic Park Associates, the Pacific Coast Federation of Fishermen's Associations, the Rivers Council of Washington, Salmon For All, the Sierra Club, Trout Unlimited, the Washington Environmental Council, the Washington Trollers Association, In Support of Respondents, PUD No. 1, 114 S.Ct. 1900 (1994)(No. 92-1911).

¹⁵PUD No. 1, 114 S.Ct. at 1914.

II. STATEMENT

The Petitioners in this case are PUD No. 1 of Jefferson County, State of Washington, and the City of Tacoma, Washington.⁹ Their position is supported by the Federal Energy Regulatory Commission ("FERC")¹⁰ and other parties involved in the hydroelectric utility industry. Respondents are the Washington State Department of Ecology and various governmental agencies of the State of Washington. The United States Environmental Protection Agency ("EPA") supports their position and, in fact, conducted a moot court for them prior to argument before the United States Supreme Court.¹¹ The Solicitor General of the

⁹PUD No. 1 of Jefferson County is a public utility district organized under Washington Revised Code ("RCW") 4.04.020. Tacoma operates a municipal electric system under RCW 35.92.050. They are authorized to jointly construct, own, and operate electric utilities under RCW 35.92.280-310.

¹⁰At oral argument before the Supreme Court, the Solicitor General of the United States supported Respondents' position. The Supreme Court, in its opinion, says that the Solicitor General "stated that both EPA and FERC were represented at the proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification." PUD No. 1, 114 S.Ct. at 1914. Mr. Randolph Hill, a member of the EPA-OGC staff who attended oral arguments, said the Court misquoted the Solicitor General. The Solicitor General said words to the effect that FERC had agreed to the filing of the government's brief.

¹¹The author worked as an intern in the Water Division of the Office of General Counsel-EPA during the first quarter of 1994. An EPA-OGC staff attorney (Mr. Hill) assisted respondents' attorneys conduct a moot court shortly before oral arguments were heard before the United States Supreme Court.

Act ("FPA").¹⁶ FERC regulations require an applicant to consult with the State.¹⁷

Petitioners also applied for a water quality certificate from the Department of Ecology of the State of Washington ("State DOE") as required by FERC¹⁸ and section 401 of the Federal Water Pollution Control Act (commonly called The Clean Water Act, "CWA").¹⁹

State DOE was created to administer Washington's CWA program. It therefore makes the decisions whether to grant (with or without conditions) or deny § 401 certifications.²⁰ Petitioners complied with the mandates of FERC and CWA § 401 by consulting with the State DOE, the State Departments of Fisheries and Wildlife, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council.²¹

¹⁶FPA § 4(e), 16 U.S.C. § 797(e); 52 Fed. Reg. 23,342 (1987).

¹⁷18 C.F.R. § 4.38(a)(1992).

¹⁸*Id.*

¹⁹86 Stat. 816, as amended, 33 U.S.C. §§ 1251 *et seq.* (1988). Although there were several earlier statutes that dealt with clean water issues, the Clean Water Act of 1977, Pub. L. No. 95-217, approved December 27, 1977, 91 Stat. 1566, was essentially the first iteration of today's comprehensive CWA.

²⁰Wash. Rev. Code (RCW) 90.48.260 (Supp. 1992).

²¹State Dept. of Ecology v. PUD No. 1, 849 P.2d 646 at 649 (Wash. 1993).

As part of the section 401 application process, Tacoma conducted a 2-year study of the effect of the Elkhorn Project on fish habitat on the Dosewallips River.²² That study was done in consultation with the agencies referenced above. Pursuant to the study, Tacoma proposed to maintain minimum instream flows of between 65 cubic feet per second (cfs) and 155 cfs, depending on the month of the year.²³

The State DOE did not reject Petitioner's application under § 401(a). It eventually issued Petitioners a section 401 certification but added a significant condition. That condition is the focus of this litigation. The certification required Petitioners to preserve minimum instream flow quantities of between 100 cubic feet per second ("cfs") and 200 cfs in the Dosewallips River.²⁴ The purpose, according to the State of Washington, was to preserve the Dosewallips fishery resource.²⁵ Under CWA § 401(d), the condition on minimum streamflow automatically becomes a part of the FERC license. Petitioners have disputed the legality of Washington's section 401(a) certification before the Washington Pollution Control Hearing Board ("PCHB") and the state courts of Washington. They argued that

²²Id.

²³Id.

²⁴Id.

²⁵Id.

minimum streamflows for fish habitat must be determined and set under the balancing process provided in Part I of the FPA, and not under § 401 of the CWA.²⁶

A. THE ELKHORN HYDROELECTRIC PROJECT

The proposed Elkhorn Hydroelectric Project is a new dam on the Dosewallips River. The Dosewallips River begins in the eastern Olympic Mountains and flows east toward western Puget Sound. The river is pristine and hosts salmon and steelhead trout.²⁷ The river's water quality is significantly protected because its uppermost reaches are within Olympic National Park.²⁸

The Dosewallips River and (its tributaries) is specifically identified as a "Class AA" river by Washington State law.²⁹ The characteristic uses of a Washington State Class AA river include "fish migration, rearing, spawning, and harvesting."³⁰ The Elkhorn project would divert flowing water but not impound

²⁶*Id.*

²⁷State Dept. of Ecology v. PUD No. 1, 849 P.2d at 648 (Wash. 1993).

²⁸*Id.*

²⁹WAC 173-201-080(32). "WAC" refers to the Washington Administrative Code. It consists of the State of Washington's administrative regulations.

³⁰WAC 173-201-045(1)(b)(iii).

it.³¹ In this case, most of the water in the Dosewallips River would be diverted into a tunnel and run parallel to the river 1.2 miles downstream to a powerhouse containing two electricity producing hydro-powered generators.³² The water then would be discharged back into the river. The 1.2 mile stretch of river between where the water is diverted by the dam and where it is discharged back into the river is known as the bypass reach. The Elkhorn Project will be located on the upper reaches of the Dosewallips. That area of the Dosewallips hosts Chinook and Coho salmon and steelhead trout.³³ The American Fisheries Society has written that the spring and fall Chinook runs are at a high risk of extinction.³⁴ State and Indian fishery agencies list the winter steelhead trout run as "depressed".³⁵

The Washington Supreme Court found that the Elkhorn Project, with its proposed minimum flows, would reduce available fish habitat to such an extent that

³¹In re Section 401 Water Quality Certification granted by Department of Ecology to PUD No. 1 of Jefferson County and City of Tacoma, No. 86-118 (Wash. Pollution Control Hearings Board 1989).

³²*Id.*

³³*Id.*

³⁴Willa Nehlsen, et al., *Pacific Salmon at the Crossroads: Stocks at Risk From California, Oregon, Idaho, and Washington*, 16 *Fisheries* Vol. 2 at 10 (March-April, 1991).

³⁵Washington Department of Fisheries, et al., 1992 Washington State Salmon and Steelhead Stock Inventory 122 (March, 1993).

continued use of the bypass reach by the salmon and steelhead trout would be adversely affected.³⁶

B. STATUTORY AND REGULATORY BACKGROUND

1. The Federal Power Act

The Federal Power Act (FPA)³⁷ provides the primary regulatory framework for hydroelectric power projects. Congress enacted the Federal Water Power Act of 1920³⁸ in order to secure a comprehensive development of national resources.³⁹ The Supreme Court had noted that the best way to comprehensively develop those resources was to centralize licensing authority in one federal administrative body that would exercise a consistent and comprehensive planning role.⁴⁰

Under the FPA, Congress gave FERC exclusive authority to issue or renew licenses for hydroelectric projects.⁴¹ FERC's jurisdiction over the licensing of

³⁶State Dept. of Ecology v. PUD No. 1, 849 P.2d at 650.

³⁷16 U.S.C. §§ 791 *et seq.* (1988).

³⁸The Congress, in 1920, created the federal licensing program for hydroelectric projects when it enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920). This was later incorporated into Part I of the FPA.

³⁹First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152, 181, 66 S.Ct. 906, 90 L.Ed. 1143 (1946).

⁴⁰*Id.* at 164, 182.

⁴¹FPA §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, 817(b).

hydroelectric projects is generally exclusive absent a Congressional delegation to the states of authority to impose requirements on the process.⁴² The Supreme Court recently upheld that general principle in California v. FERC.⁴³

The Congress, however, has eroded FERC's "exclusive" jurisdiction over the past decades, primarily in environmental areas. Section 401 of the Clean Water Act is one example of an express delegation by Congress to the states.

Section 4(e) of the FPA requires the FERC to consider many factors before it issues a license. In 1986, more than ten years after enacting the Clean Water Act, Congress enacted the Electric Consumers Protection Act ("ECPA").⁴⁴ The ECPA underscored the FERC's duty to consider much more than just power production and development when making licensing decisions. The Congress, in the ECPA amendments, tried to insure that nondevelopmental values would be properly taken into account by FERC when it decided whether and under what conditions a hydroelectric license should be issued.

ECPA amended Section 4(e) of the FPA to insure that the FERC:

shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat), the

⁴²FPC v. Oregon, 349 U.S. 435, 446, 75 S.Ct. 832, 99 L.Ed. 1215 (1955).

⁴³495 U.S. 490, 110 S. Ct. 2024, 109 L.Ed.2d 474 (1990).

⁴⁴Pub. L. No. 99-495, 100 Stat. 1243.

protection of recreational opportunities, and the preservation of other aspects of environmental quality.⁴⁵

FPA § 10(a)(1) details what conditions licenses generally must contain.⁴⁶

Projects must be "best adapted to a comprehensive plan" for improving or developing the waterway. The ECPA added language to FPA § 10(a)(1) that corresponded to the new language in § 4(e).

The Congress, by enacting the ECPA amendments, tried to insure that the FERC would balance environmental and conservation values in addition to those related solely to power and engineering. The current section 10(a) of the FPA requires FERC to balance many additional factors that state water quality agencies are not required to consider under section 401 of the Clean Water Act. Some of those factors include regional power requirements, water supply, etc.

The FERC must now consider all public interest factors when it considers development of a waterway. Therefore, the federal licensing process involves comprehensive balancing of various public interest factors which often cannot easily be reconciled. The FERC cannot grant a hydroelectric project license unless that project is part of a comprehensive plan that balances the following public interest factors:

⁴⁵16 U.S.C. § 797(e)(1988).

⁴⁶16 U.S.C. § 803(a)(1)(1988).

(1) improving or developing a waterway for the use or benefit of commerce; (2) the improvement and utilization of water power development; (3) the adequate protection, mitigation, and enhancement of fish and wildlife; (4) irrigation; (5) flood control; (6) water supply; (7) recreation; and (8) other beneficial uses.⁴⁷

FERC actually amended its regulations implementing Part I of the FPA to reflect comprehensive balancing of public values before the 1986 ECPA amendments. FERC, in 1981, changed its regulations pertaining to applications for hydroelectric project licenses.⁴⁸ The amended regulations require license applicants to submit various reports that are related to environmental resources.⁴⁹ FERC uses those reports when balancing the various factors that affect the public interest in the development of the waterway. The regulations echo the factors listed in the previous paragraph.

The ECPA also added a requirement to put restrictions in FERC licenses for environmental purposes. Section 10(j), added by the ECPA, states that in order to "protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the . . . project," each license shall

⁴⁷16 U.S.C. §§ 803(a), 797(e)(1988).

⁴⁸18 C.F.R. § 4.41(f), 4.51(f) (1993).

⁴⁹Those reports include a Report on Water Use and Quality, a Report on Fish, Wildlife and Botanical Resources, a Report on Historic and Archeological Resources, a Report on Socio-Economic Impact, a Report on Geological and Soil Resources, and a Report on Recreation Resources. *See* 18 C.F.R. §§ 4.41(f), 4.51(f) (1993).

contain conditions for such protection, mitigation, and enhancement "based on recommendations received pursuant to the Fish and Wildlife Coordination Act . . . from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies."⁵⁰

The conditions imposed by FERC in the license are to be based on these recommendations unless FERC determines that the recommendations are inconsistent with the purposes and requirements of [FPA Part I] or with other applicable provisions of law. Section 10 (j) authorizes the FERC to disregard other agency recommendations if it finds that they are inconsistent with the FPA Part I or other laws.⁵¹

⁵⁰16 U.S.C. § 803(j)(1) (1988).

⁵¹Section 10 (j) of the FPA states:

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act [16 U.S.C. 661 et seq.] from the National Marine Fisheries Services, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to

(continued...)

2. The Clean Water Act

The primary objective of The Clean Water Act is rather ambitious. It seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵² Section 101(a) contains two national goals: (1) Eliminate discharge of pollutants into U.S. waters by 1985; and (2) Achieve a level of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for water recreation by 1983.⁵³

The CWA is implemented through a comprehensive program for regulation of water pollution that "anticipates a partnership between the States and the Federal

⁵¹(...continued)

in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subsection or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

16 U.S.C. § 803(J)(1988).

⁵²33 U.S.C. § 1251(1988).

⁵³33 U.S.C. § 1251(a)(1) and (a)(2)(1988).

Government"⁵⁴ The CWA gives the states a large role in regulating water pollution. There are two general types of pollution control in CWA, effluent standards and water quality standards. Effluent standards regulate pollutants at the source. The CWA directs EPA to promulgate effluent restrictions applicable to different categories of those sources.

The CWA also gives the states a large role in regulating water pollution. Section 101(b) of the CWA states that Congress recognizes the primary responsibilities and rights of the states to prevent, reduce, and eliminate pollution.⁵⁵ That section also recognizes the state's primary responsibility ". . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ."⁵⁶

States are authorized to establish "water quality standards" consisting of "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."⁵⁷ EPA reviews and approves the state water

⁵⁴Arkansas v. Oklahoma, 503 U.S. ___, 112 S.Ct. 1046, 1054, 117 L.Ed.2d 239 (1992).

⁵⁵33 U.S.C. § 1251(b)(1988).

⁵⁶*Id.*

⁵⁷33 U.S.C. § 1313(c)(2)(1988).

quality standards before they take effect.⁵⁸ Once they take effect, these water quality standards supplement and can further restrict the effluent limitations imposed on sources by the EPA. The use of state water quality standards to further restrict EPA's effluent restrictions is Congress' recognition of state rights in water pollution control.

Most of the CWA's regulatory requirements are contained in Titles III and IV. Title III is titled "Standards and Enforcement". Its sections provide for effluent limitations, water quality standards, among other standard setting and enforcement regimes.⁵⁹ Section 301 is the central control mechanism of CWA's Title III. It prohibits discharging any pollutant "except in compliance with law".⁶⁰

Section 301(b) sets up two successive sets of technology-based effluent limitations for pollutant discharges in (b)(1) and (b)(2). It mandates more stringent limitations on pollutant discharges if the first level of technology-based standards does not achieve water quality standards for the receiving waters.⁶¹

⁵⁸33 U.S.C. § 1313(c)(3)(1988). The EPA Administrator must promulgate water quality standards for a state if the state fails to adopt standards that meet federal requirements. CWA § 303, 33 U.S.C. § 1313(c)(1988).

⁵⁹33 U.S.C. §§ 1311-1330(1988).

⁶⁰33 U.S.C. § 1311(1988).

⁶¹33 U.S.C. § 1311(b)(1)(C)(1988).

Section 302 establishes and sets standards for water quality related effluent limitations.⁶² Section 302(a) accomplishes the same purpose as § 301 if the second level of technology-based standards does not achieve water quality standards. As mentioned above, § 303 concerns state water quality standards and implementation plans.⁶³ If technology-based effluent limitations do not suffice to meet the desired quality of the receiving water, more stringent effluent limitations are developed to meet water quality standards. This second approach is required in CWA §§ 301(b)(1)(C) and 302.

The Supreme Court devotes a great deal of its opinion delving into the interaction between CWA §§ 303 and 401. Section 306 requires establishment of national standards of performance for the control of the discharge of pollutants.⁶⁴ Section 307 sets pretreatment standards and bans the discharge of various toxic effluents.⁶⁵

Under CWA § 401(a)(1), an applicant for a federal license or permit authorizing an activity that may result in a discharge into navigable waters, must first provide a certification from the State. The certification must state ". . . that

⁶²33 U.S.C. § 1312(1988).

⁶³33 U.S.C. § 1313(1988).

⁶⁴33 U.S.C. § 1316(1988).

⁶⁵33 U.S.C. § 1317(1988).

any such discharge will comply with the applicable provisions of [sections 301, 302, 303, 306, and 307 of the CWA]."⁶⁶ The Petitioners in this case had to obtain a section 401 certification from State DOE in addition to their FERC permit because the Elkhorn Project may result in some discharge into navigable waters.⁶⁷

Section 401(d) of the CWA⁶⁸ plays a critical role in the PUD No. 1 litigation. It allows the states to place conditions on water quality certificates they issue pursuant to § 401(a)(1). Section 401(d) requires that any state certification shall set forth:

any applicable effluent limitations and other limitations, under section 1311 [301] or 1312 [302] of this title, standard of performance under section 1316 [306] of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 [307] of this title, and with any other appropriate requirement of State law set forth in such certification (emphasis added by author)

In this way, state water quality standards under CWA § 303, by operation of § 301(b)(1)(C), are incorporated into § 401(d). Therefore, any conditions added by the state pursuant to § 401, such as conditions issued pursuant to state water quality standards can become conditions on a federal (including FERC) permit.

⁶⁶States are directed by CWA § 401 to act on a request for certification within a reasonable amount of time, not to exceed one year. If the State denies the certification, the federal agency may not issue the license or permit.

⁶⁷FERC regulations make the CWA § 401 certification process part of the hydroelectric licensing procedures under the Federal Power Act. 18 C.F.R. § 4.38(a)(1992).

⁶⁸33 U.S.C. § 1341(d)(1988).

FERC does not look behind conditions imposed by state water quality agencies. FERC has specifically concluded on several occasions in the past four years that it has no authority to review those conditions, even if it believes that those conditions are not within the legal scope of § 401.⁶⁹

FERC thus believes that, generally, review of the appropriateness of water quality certification conditions is within the purview of state courts. EPA concurs that FERC has no authority to alter or reject conditions imposed by a state in a § 401 certification.⁷⁰ EPA has also concluded that conditions and limitations imposed by the states in water quality certificates are reviewable only in state courts.⁷¹

⁶⁹See *Town of Summerville*, 60 F.E.R.C. ¶ 61,291 at p. 61,990 (1992) ("Since pursuant to § 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of the State courts and not the Commission"; *Noah Corporation*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991) ("We recognize that review of the appropriateness of water quality certification conditions is a matter for State courts to decide."); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,172 (1990) ("Review of the appropriateness of water quality certification conditions is the purview of the State courts."); *see also Carex Hydro*, 52 F.E.R.C. ¶ 61,216 at 61,770-771 (1990).

⁷⁰40 C.F.R. § 124.55(e)(1992).

⁷¹*Id.*

The Federal courts have also agreed with this assessment.⁷² Therefore, one must use state courts (and ultimately the U.S. Supreme Court) to remedy an improper CWA § 401(d) condition on a federal license.

3. EPA Regulations Implementing Water Quality

Under EPA regulations implementing CWA § 303(c)(2)(a),⁷³ state water quality standards must "protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. . . ."⁷⁴ That regulation further states, "[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses."⁷⁵

These regulations also require States to get EPA approval for water quality standards that establish "use designations" pursuant to CWA § 303(c)(2).⁷⁶ 40 CFR § 131.6(c) (1992), states that the State's standards must include "[w]ater quality criteria sufficient to protect the designated uses." EPA regulations define the

⁷²Roosevelt Campobello Int'l Park Comm'n. v. EPA, 684 F.2d 1041 (1st Cir. 1982); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977).

⁷³33 U.S.C. § 1313 (c)(2)(A)(1988).

⁷⁴40 CFR § 131.2 (1992).

⁷⁵*Id.*

⁷⁶40 CFR § 131.6(a)(1992).

criteria as: ". . . elements of state water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use."⁷⁷ The criteria must be backed up with evidence which proves the "adequacy of the scientific basis of the standards."⁷⁸

4. Pertinent State of Washington Statutes and Regulations

The State of Washington regulates the quality of the waters within its borders.⁷⁹ The State DOE, in accordance with CWA § 303 and RCW ch.90.48.260, has produced "water quality standards for surface waters for the State of Washington".⁸⁰ The water quality standards classify Washington's waters into various use and criteria classes.⁸¹ The highest class of water in the State of Washington is Class AA. The Dosewallips River, as mentioned earlier, is a Class AA water. Class AA waters are classified "extraordinary" if they "markedly and

⁷⁷40 CFR § 131.3(b)(1992).

⁷⁸40 CFR § 131.6(f) (1992).

⁷⁹Washington Revised Code ("RCW") ch.90.48 (1992).

⁸⁰Washington Administrative Code ("WAC") Ch. 173-201.

⁸¹WAC 173-201-045.

uniformly exceed the requirements for all or substantially all uses," including, but not limited to, "fish migration, rearing, spawning and harvesting".⁸²

Specific water quality criteria also apply to Class AA waters. These criteria are specific limits on pollutants such as fecal coliform, dissolved oxygen (BOD), dissolved gas, temperature, pH, turbidity, and toxic, radioactive or deleterious material.⁸³ By separate statute, Washington also requires that perennial streams "shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values.⁸⁴

⁸²WAC 173-201-045(1)(a) and (b)(iii).

⁸³WAC 173-201-080; WAC 173-201-045(1)(c).

⁸⁴RCW 90.54.020(3)(a).

III. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS BELOW

A. ADMINISTRATIVE PROCEEDINGS

As referenced earlier, the Petitioners applied for a CWA § 401 certification from State DOE because their proposed hydroelectric project would cause a discharge into navigable waters (the Dosewallips River). As part of that CWA § 401 process, Petitioners began working with experts from various State, Federal, and Indian agencies to determine a minimum flow that would protect salmon and steelhead trout in the bypass reach area of the Dosewallips River. Per recommendation of the agencies and tribes, Petitioner conducted a two year instream flow study using the state of the art Instream Flow Incremental Method ("IFIM").⁸⁵

When the study ended, the Petitioner was unable to agree with the agencies as to the necessary instream minimum flow. State DOE issued the CWA § 401 certification but conditioned it on maintenance of the higher instream flow amount recommended by the agencies and tribes.⁸⁶

⁸⁵The IFIM is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. IFIM uses a computer modeling study "to determine 'weighted usable area' in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat and hence fish production." The study was done in close consultation with Federal and State agencies. State Dept. of Ecology v. PUD No. 1, 849 P.2d at 649.

⁸⁶RCW 90.22.010 (Supp. 1992), requires the State DOE to establish stream flows to protect fish and wildlife when State fish and wildlife agencies request it
(continued...)

The § 401 certificate contained language that the minimum flows required by State DOE were in excess of those required to maintain water quality in the bypass region.⁸⁷ However, the Washington Supreme Court noted that six fisheries biologists involved in State DOE's setting of instream flow rates for the Dosewallips believed that the intent was to preserve and protect the Dosewallips fishery, not to enhance it.⁸⁸

Petitioners appealed the § 401 certificate to Washington State's Pollution Control Hearings Board ("PCHB").⁸⁹ The PCHB held a hearing on 15-18 December 1988 as to:

- 1) Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values.

⁸⁶(...continued)

to do so, or when it concludes that the stream flows are required to preserve water quality. It is not an EPA sanctioned water quality standard. State Dept. of Ecology v. PUD No. 1, 849 P.2d 646, 649.

⁸⁷*Id.* This appears to be a concession by State DOE that the minimum stream flow is not related to water quality.

⁸⁸State, Dept. of Ecology v. PUD No. 1, 849 P.2d 646 at 648 (Wash. 1993).

⁸⁹The PCHB is a quasi-judicial administrative board with jurisdiction to hear appeals from final decisions from State DOE. RCW 43.21b.110 (1992).

(2) What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?⁹⁰

The PCHB found that the area between where the water is diverted from the river and where it returns (called the by-pass reach) was inhabited by steelhead and, to a lesser extent, Coho and Chinook salmon. The PCHB further found that the quantities of these fish were sufficient to justify base flows tailored to the life cycles of those species.⁹¹ The PCHB also ruled that the base flows at issue "enhance" the fish producing potential of the Dosewallips River flowing in its essentially natural state and are therefore inconsistent with RCW 90.54.020(3)(a)⁹² which limits base flows to those necessary "to provide for preservation" of fish.⁹³

On 24 February 1989, the State and Petitioners cross-appealed the PCHB's decision to the Thurston County Superior Court.

⁹⁰In re Section 401 Water Quality Certification granted by Department of Ecology to PUD No. 1 of Jefferson County and City of Tacoma, No. 86-118 (Wash. Pollution Control Hearings Board 1989).

⁹¹Id.

⁹²Base flows in perennial rivers of the State of Washington are addressed by the State Water Resources Act of 1971, Chapter 90.54 RCW. In pertinent part, that Act provides at RCW 90.54.020(a) as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for **preservation** of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values . . . (emphasis supplied).

⁹³Id.

B. JUDICIAL PROCEEDINGS

1. Superior Court

The Superior Court affirmed the PCHB's ruling that the minimum flow condition is authorized by CWA § 401 and that the minimum flow condition is not preempted by the FPA.⁹⁴ The Superior Court also held that until FERC has made its determination, the State of Washington has authority to determine what it considers to be necessary minimum instream flow rates.⁹⁵

It affirmed the PCHB's decision on the preemption issue since Petitioner had failed to show that FERC had made a decision on what the minimum instream flow rates should be.⁹⁶ It reversed the PCHB's decision that the State DOE imposed minimum flow regime is an enhancement regime.⁹⁷ Finally, it reversed the PCHB's conclusion that RCW 90.54.020(3) does not allow an enhancement flow condition under the circumstances presented by the case.⁹⁸

⁹⁴State of Washington, Departments of Ecology, Fisheries and Wildlife v. PUD No. 1 of Jefferson County and City of Tacoma, No. 89-2-00413-2 (Super. Ct. Wash. filed Aug. 14, 1991).

⁹⁵Id.

⁹⁶Id.

⁹⁷Id.

⁹⁸Id. RCW 90.54.020(3) does not authorize a minimum flow regime that enhances the amount of fish habitat. It only authorizes a minimum flow that will preserve fish habitat.

2. The Supreme Court of Washington

Petitioners appealed to the Supreme Court of Washington. It granted Petitioners' motion for direct review and unanimously affirmed the Superior Court.⁹⁹ The State Supreme Court held that the minimum streamflow conditions in the CWA § 401 certificate were necessary to ensure the Elkhorn Project's compliance with state water quality standards.¹⁰⁰

The court also stated that conditions that are necessary to insure a project's compliance with water quality standards are appropriate under CWA § 401.¹⁰¹ It was necessary, according to the court, because those water quality standards prohibit degradation of Washington's waters.¹⁰²

The Washington Supreme Court also held that "man-induced alteration of streamflow level is 'pollution'".¹⁰³ The court noted that "the concept of pollution in the Clean Water Act is extremely broad." It cited the definition in § 502(19) of

⁹⁹State, Department of Ecology v. PUD No. 1 of Jefferson County, 849 P.2d 646 (WASH. 1993).

¹⁰⁰State, Dept. of Ecology v. PUD No. 1, 849 P.2d 646 at 650.

¹⁰¹The court noted that Petitioners conceded in their argument that conditions designed to ensure compliance with water quality standards are appropriate under CWA § 401. *Id.*

¹⁰²*Id.* This applied particularly to degradation of fish habitat and spawning in the Class AA Dosewallips River.

¹⁰³*Id.*

the CWA, that reads: "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water." Thusly, under this broad definition, man-induced alteration of streamflow equated to "pollution".¹⁰⁴

The court in its decision also referred to a letter written by LaJuana Wilcher, Assistant Administrator of the EPA, to the Secretary of FERC. The letter takes issue with an assertion in a FERC report that conditions related to fish, wildlife, vegetation, and recreation are inappropriate in CWA § 401 certificates needed to obtain licenses from FERC.¹⁰⁵ The court cites other states (Maine, Montana, and Vermont) that also have water quality standards that make reference to fish and

¹⁰⁴Id.

¹⁰⁵Id. The letter says:

[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include . . . the diversity and composition of the aquatic species . . . [and] habitat loss . . .

(Letter from LaJuana Wilcher, Assistant Administrator of the EPA, to the Honorable Lois D. Cashell, Secretary of FERC).

wildlife concerns.¹⁰⁶ In other words, it concluded that designated uses (including fish habitat) are a vital part of water quality standards.¹⁰⁷

The Washington Supreme Court disagreed with Tacoma's assertion that the phrase "any other appropriate requirement of state law" in CWA § 401(d) referred only to state water quality standards. It agreed with the PCHB's ruling that the phrase refers to all state water quality-related rules, including, but not limited to, the water quality standards the state has adopted per CWA § 303, 33 U.S.C. § 1313. It also found that RCW 90.54.020(3)(a), that mandates retention of base

¹⁰⁶*Id.*

¹⁰⁷*Id.* For example, in *Bangor Hydro-Elec. Co. v. Board of Env'tl. Protec.*, 595 A.2d 438 (Me. 1991), the Maine Supreme Court rejected the argument that the Maine Board of Environmental Protection had exceeded its authority in asking for information about a project's effect upon fish habitat. The court said that under Maine's water quality standards, the "designated uses" of the affected river include fish habitat. The court stated that because these designated uses are an integral part of the state water quality standards, the Board's information request was proper. 595 A.2d at 443. In a similar case, the Montana Board of Health and Environmental Sciences issued a CWA § 401 certificate for a "siphon scheme" at a hydroelectric dam that would have raised the temperature of the water in the river. The court upheld the district court ruling that the record failed to show the project would not violate state water quality standards, which included provisions regarding the use of the river for fish habitat. *Hi-Line Sportsmen Club v. Milk River Irrig. Dists.*, 241 Mont. 182, 187-88, 786 P.2d 13 (1990). The Vermont Supreme Court has recognized water quality standards as appropriately concerning aesthetics, recreation, and wildlife. *Georgia-Pacific Corp. v. Vermont Dep't of Env'tl. Conservation*, 35 Env't Rep. (BNA) 2046 (Vt. Super. Ct. Oct. 4, 1991), *aff'd* 35 Env't Rep. (BNA) 2052 (Vt. Sup. Ct. Sept. 14, 1992).

flows in perennial streams necessary to preserve fish and wildlife, is an "appropriate requirement of State law" under § 401.¹⁰⁸

The Washington State Supreme court observed that Congress' "broad purpose" in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁰⁹ The court said this "broad purpose suggests that what state laws qualify as 'appropriate' for purposes of section 401(d) should also be understood broadly."¹¹⁰ The court buttressed its observation by noting that § 401 expressly lists CWA §§ 301, 302, 306, and 307 sources for the limitations in § 401 certificates.¹¹¹

The court thus maintained that where Congress intended to refer to a specific provision, it did so. It said that in contrast, CWA § 303 -- the section requiring states to adopt water quality standards -- is not listed in § 401.¹¹² Therefore, it concluded that Congress must have intended the CWA § 401 language, "any other

¹⁰⁸Id. at 651-53.

¹⁰⁹CWA § 101(a), 33 U.S.C. § 1251(a).

¹¹⁰State, Dept. of Ecology v. PUD No. 1, 849 P.2d 646 at 651-52.

¹¹¹Id. at 652.

¹¹²Id. at 651.

appropriate requirement of State law", to refer broadly to all state water quality-related laws, and not just to § 303 water quality standards.¹¹³

Finally, the court disagreed with Tacoma's assertion that the FPA preempts State DOE's action.¹¹⁴ Several factors convinced the court that State DOE's action lacked the character of state action required for preemption to apply.¹¹⁵ First, a section 401 certificate is a federal permit required under the CWA § 401.¹¹⁶ Since the State is federally required to set forth limitations, the court felt the State could not be said to be acting independently of the federal government.¹¹⁷

Second, the court said that sources of the streamflow limitation at issue are state laws integrated into the CWA.¹¹⁸ State DOE's action was required, according to the court, to assure compliance with RCW 90.54.020(3)(a) and Washington's

¹¹³*Id.* at 653.

¹¹⁴*Id.* at 653-657. State DOE's action was adding streamflow conditions under CWA § 401(d) to the water quality certificate.

¹¹⁵The federal preemption doctrine is based on the Supremacy Clause of the United States Constitution, U.S. Const., art. 6, cl. 2. A threshold requirement before the doctrine can apply is that there is some state action to be preempted by federal law. *See generally* L. Tribe, American Constitutional Law section 6-25 (2d ed. 1988).

¹¹⁶33 U.S.C. § 1341(1988).

¹¹⁷*State, Dept. of Ecology v. PUD No. 1*, 849 P.2d 646 at 653.

¹¹⁸*Id.* at 653-54.

water quality standards, that are integrated into the CWA as "appropriate requirement[s] of state law" under § 401(d).¹¹⁹

Third, the court found that federal involvement in the development of state water quality standards is "extensive."¹²⁰ Those standards are required under CWA § 303.¹²¹ CWA § 303 requires states to devise water quality standards in accordance with federal regulations and to submit them to EPA for approval.¹²² They don't become the water quality standards for the state until the EPA approves them.¹²³

The court further noted that the State of Washington's water quality standards have indeed been approved by the EPA.¹²⁴ Had Washington failed to submit standards that met CWA requirements, the EPA ultimately would have had to promulgate standards for the State.¹²⁵ The court concluded that this hybrid

¹¹⁹*Id.*

¹²⁰*Id.* at 653.

¹²¹33 U.S.C. § 1313(1988).

¹²²State, Dept. of Ecology v. PUD No. 1, 849 P.2d 646 at 653.

¹²³*Id.*

¹²⁴See 50 Fed. Reg. 29,761 (1983) which notes EPA's approval of the State of Washington's water quality standards.

¹²⁵33 U.S.C. § 1313(c)(4); See also 56 Fed. Reg. 58,477 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) a proposed EPA rulemaking by EPA to bring Washington's water quality standards into compliance with CWA § 303(c)(2)(B).

statutory framework gives the state laws a "federal character" insofar as the EPA regulates their content and must formally approve them before they become the State's water quality standards.¹²⁶

The court felt that the conditions in the § 401 certificate were designed to ensure compliance with water quality standards required by CWA § 303 and approved by the EPA.¹²⁷ Therefore, it reasoned that the conditioning of the permit could not fairly be regarded as state action for purposes of federal preemption. The Washington Supreme Court concluded that, "Simply put [the] federal preemption doctrine does not apply in a context where a state is acting to fulfill its federally mandated role in the comprehensive federal scheme embodied in the CWA."¹²⁸

The court also ruled that there was no preemption because no conflict existed between the minimum flow condition and any federal action. Plus, it reiterated that given CWA § 401, it could not rule that the FPA has occupied the field so as to preclude a state action.¹²⁹

¹²⁶State, Dept. of Ecology v. PUD No. 1, 849 P.2d 646 at 654.

¹²⁷Id.

¹²⁸Id.

¹²⁹Id. at 655.

IV. ISSUES BEFORE THE U.S. SUPREME COURT

A. WHETHER THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE CERTIFICATION AUTHORITY GRANTED TO THE STATES IN SECTION 401 OF THE CLEAN WATER ACT IS INCONSISTENT WITH CONGRESS' GRANT OF AUTHORITY TO FERC IN THE FEDERAL POWER ACT.

1. Petitioners' Position

Throughout their brief to the Court, Petitioners assert that the Washington Supreme Court interpreted CWA § 401 expansively.¹³⁰ Under that court's interpretation petitioners argue that a state could impose conditions on a FERC license, such as minimum stream flows to protect fish habitat, based on virtually any State requirement related to water uses.

In the Elkhorn litigation, the Washington Supreme Court found that, under § 401, State DOE had authority to impose conditions requiring minimum flows to protect fish habitat, even though those conditions are arguably not required to comply with Washington's water quality criteria.¹³¹ Under the court's reasoning, many water related requirements of state law,¹³² might be added as conditions and limitations in a CWA § 401 certificate.

¹³⁰Petitioners' Brief at 19-29, PUD No. 1 (No. 92-1911).

¹³¹State Dept. of Ecology v. PUD No. 1, 849 P.2d at 651.

¹³²These might include state law requirements pertaining to fish, wildlife, aesthetics, recreation, navigation, etc.

As is true for many U.S. Supreme Court cases, there is persuasive authority for both sides. On the one hand, Congress has delegated FERC considerable authority to regulate hydroelectric projects in the FPA. Under the FPA, as amended by the Electric Consumers Protection Act,¹³³ FERC has extensive authority¹³⁴ to set license conditions related to fish and wildlife in the exercise of its statutory obligations to consider and reconcile competing water use demands. FPA § 10 could be interpreted to give FERC authority (not exercised in the present case) to determine, using a balancing test, whether stream flow provisions should be included in the license.

The Federal Power Act also has provisions that appear to support the states' position. Section 9(b) of the FPA requires license applicants to provide evidence that they have complied with state laws concerning the development of hydropower.¹³⁵ Section 27 of the FPA states:

¹³³See *supra* note 44.

¹³⁴See especially, FPA § 10(j), *supra* note 51.

¹³⁵Sec. 9. That each applicant for a license hereunder shall submit to the commission--

...

(b) Satisfactory evidence that the applicant has complied with the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and

(continued...)

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the representative states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The two FPA sections appear to clearly preserve state law, but the Supreme Court has interpreted them both narrowly.

The Supreme Court has ruled that FPA § 9(b) does not give states the right to veto federal projects.¹³⁶ In First Iowa, a hydro-electric cooperative applied for a license to construct a dam on the Cedar River. The Federal Power Commission dismissed First Iowa Cooperative's application for a license to construct a water power project because the Cooperative failed to present satisfactory evidence of compliance with Iowa statutes.¹³⁷ The laws of Iowa¹³⁸ required a state license in addition to the federal one, but compliance with both appeared impossible. The Supreme Court stated that giving states veto power over projects that may violate

¹³⁵(...continued)

distributing power, and in any other business necessary to effect the purposes of a license under this Act.

41 Stat. 1068, 16 U.S.C. § 802(B).

¹³⁶*First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946).

¹³⁷*Id.* at 162.

¹³⁸Chapter 363, section 7767 of the Code of Iowa required the issuance of a permit by the Executive Council of the State of Iowa.

state law would counter the Act's purpose of comprehensive nationwide development of water resources.¹³⁹ The Court noted that the FPA was the outgrowth of a major change of national policy in order to avoid piecemeal and restrictive water resource development.¹⁴⁰ The Supreme Court said the detailed provisions of the FPA providing for the federal plan of regulation leave no room or need for conflicting state controls.¹⁴¹ The Court felt that FPA § 9(b) was merely informational and that if the Commission was satisfied with state law compliance, then its decision was binding.¹⁴²

Almost a decade later, the Supreme Court found Federal Power Commission jurisdiction under the property power because a dam was to be located on federal reserved lands.¹⁴³ It held that the Federal Power Commission could grant a license to a private hydro-electric power project on a non-navigable stream over the State of Oregon's objection that the fish population would be harmed.¹⁴⁴

¹³⁹First Iowa, 328 U.S. at 181.

¹⁴⁰Id. at 180.

¹⁴¹Id. at 181.

¹⁴²Id. at 178.

¹⁴³Federal Power Commission v. Oregon, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955)(The Pelton Dam case).

¹⁴⁴Id.

The case that offered the greatest modern support for the Petitioners is California v. FERC.¹⁴⁵ In that case, the Supreme Court ruled that California's imposition of minimum stream flows for the protection of fish under FPA § 27 was improper.¹⁴⁶ It held that a state's attempt to impose minimum streamflow conditions in a water permit was preempted by the FPA because it conflicted with the FERC's licensing authority.¹⁴⁷

The Court said that under FPA § 10(j), fish and wildlife considerations, including minimum streamflows, fall within FERC's "broad and paramount federal regulatory role."¹⁴⁸ The Court reaffirmed the holding it made forty years earlier in First Iowa that Congress' intent in enacting the Federal Water Power Act of 1920 was "to secure a comprehensive development of national resources."¹⁴⁹

The Washington Supreme Court held that the precedents above did not apply in the case at bar because the terms and conditions of a CWA § 401 certificate "become terms and conditions of the (FERC) license as a matter of law."¹⁵⁰

¹⁴⁵495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990).

¹⁴⁶*Id.* at 505-507.

¹⁴⁷*Id.* at 506-507.

¹⁴⁸California v. FERC, 495 U.S. at 499.

¹⁴⁹First Iowa, 328 U.S. at 181.

¹⁵⁰State Dept. of Ecology v. PUD No. 1, 849 P.2d at 654; 51 Fed. Energy Reg. Comm'n (CCH) para 61,268 at 61,343.

Therefore, the Washington Supreme Court concluded that by adding the streamflow conditions in the § 401 certificate, State DOE was merely fulfilling its duty under federal law.¹⁵¹

I believe that in order to agree with the court's reasoning, one would have to accept that Congress intended to adopt a parallel state regulatory scheme in addition to the comprehensive responsibilities Congress gave to FERC in Part I of the FPA. Petitioners disagreed with that assumption and found support in the Third Circuit Court of Appeals. The Third Circuit held that CWA § 401 "gives states exclusive authority only to issue a certification, prior to licensing, that any discharge into navigable waters will comply with [§§ 301, 302, 303, 306 and 307]."¹⁵²

Petitioners framed the "ultimate question" in this case as who did Congress want to determine appropriate streamflow quantities for hydroelectric projects.¹⁵³ Petitioners asserted that the Supreme Court had to interpret CWA §§ 401 and 303 in the context of the FPA's comprehensive regulatory scheme.

¹⁵¹Id.

¹⁵²Pennsylvania Dep't of Envtl. Resources v. FERC, 868 F.2d 592, 598 (3rd Cir. 1989). In Pennsylvania v. FERC, the Third Circuit disagreed with a Pennsylvania environmental agency that FERC unlawfully usurped the State's CWA § 401(d) certification authority. FERC would not waive articles of the license that needed its review and approval of project modifications that were supposed to maintain Pennsylvania water quality standards.

¹⁵³Petitioners' Brief at 20, PUD No. 1 (No. 92-1911).

As noted earlier,¹⁵⁴ FERC is charged under the FPA with protecting fish habitat while balancing a full range of public interests. (See FPA §§ 4(e), 10(a) and 10(j)). It was the Petitioners' position that those sections provide solid evidence of Congress' intent to delegate the authority to set stream flows to FERC. Those provisions, by implication, also indicate that the states are limited under CWA § 401 to reviewing discharges from hydroelectric projects solely for determining compliance with specific water quality requirements.

2. Respondents' Position

The Respondents countered that there is equally compelling evidence that Congress intended to create a parallel regulatory scheme in addition to the broad authority it granted FERC in the FPA.¹⁵⁵ The Petitioners focused on the language of the FPA to argue that states' authority under CWA § 401 should be limited to preserve FERC's "comprehensive" control over hydropower projects (including the setting of minimum stream flows).¹⁵⁶ If the FPA was the only statute involved here, the case at bar would be easily resolved by the Supreme Court. Respondents stressed, however, that it is not the only statute involved here and that it takes a subordinate role to the CWA in the present case.

¹⁵⁴In section II.B.1.

¹⁵⁵Respondents' Brief at 12, PUD No. 1 (No. 92-1911).

¹⁵⁶Petitioners' Brief at 19-21, 46-49 PUD No. 1 (No. 92-1911).

Respondents assert that one must glean Congress' intent not from the FPA, but in light of the authority granted to the states in the Clean Water Act passed over half a century later.¹⁵⁷ Respondents concede that Congress, under the FPA, did give FERC the primary role in hydroelectric regulation and licensure. See FPA § 4(e).¹⁵⁸ However, FERC's jurisdiction and authority is by no means exclusive. Congress has passed many provisions of law, even in the FPA itself, that have given other federal agencies and the states substantial independent and complementary duties under federal law.

In the five decades since passage of the FPA, Congress has reacted to pressure from federal, state, and private environmental and natural resource entities by limiting FERC's "exclusive" power. The responsibilities given to the states in § 401 of the CWA is not the only limitation in the CWA. Someone who wishes to build a hydroelectric project must, for instance, obtain a CWA § 404¹⁵⁹ permit from the Corps of Engineers in addition to the FERC license.¹⁶⁰

¹⁵⁷Respondents' Brief at 12, PUD No. 1 (No. 92-1911).

¹⁵⁸16 U.S.C. § 797(e)(1988).

¹⁵⁹33 U.S.C. § 1344(1988).

¹⁶⁰Under CWA § 404, the Secretary of the Army, acting through the Chief of Engineers (Army Corps of Engineers) issues or denies any permits required for discharge of dredged or fill materials into the navigable waters of the United States. The term "navigable waters" is defined very broadly in CWA § 502(7) as ". . . the waters of the United States, including the territorial seas."

Several courts have ruled that CWA § 404 applies to FPA/FERC projects.¹⁶¹ The D.C. Circuit ruled that under CWA § 404, the Army Corps of Engineers must consider the environmental impacts of any "discharge of dredged or fill material into the navigable waterways."¹⁶² The D.C. Circuit Court explained its position by saying that if Congress had not liked the 1974 Second Circuit ruling in Scenic Hudson, it could have amended § 404 when it enacted the 1977 amendments to the CWA.¹⁶³ The court also said that CWA § 404 applies to licenses issued by FERC because no provision in FERC or the CWA exempted hydroelectric projects from the permitting requirements of § 404.

There are numerous other examples where Congress forces FERC to adopt the determinations of other federal agencies, including the Departments of Commerce and Interior, for things that fall within their purview. If a proposed project will be built within an Indian reservation, the FPA itself mandates FERC

¹⁶¹See Scenic Hudson Preservation Conference v. Calloway, 499 F.2d 127 (2d Cir. 1974).

¹⁶²See Monongahela Power Company v. Marsh, 809 F.2d 41, 45-46 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987).

¹⁶³Monongahela Power Company, 809 F.2d at 47.

to include in the license "such conditions as the Secretary [of the Interior] shall deem necessary for the adequate protection and utilization of such reservation."¹⁶⁴

The Supreme Court ruled that the standard of review for conditions imposed by federal land management agencies in FERC proceedings was whether the conditions were reasonably related to the goal of protecting resources on federal reservations.¹⁶⁵ Respondents argued that the Court should use a similar standard in this case when reviewing the stream flow condition imposed by State DOE.¹⁶⁶ That standard would involve reviewing whether the stream flow condition is reasonably related to the goal of ensuring compliance with water quality standards under the Clean Water Act.

The Federal Land Policy and Management Act ("FLPMA") was amended to mandate that the Forest Service or Bureau of Land Management issue a right of

¹⁶⁴FPA § 4(e), 16 U.S.C. § 797(e). *See also* Escondito Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 104 S.Ct. 2105, 80 L.E.2d 753 (1984).

¹⁶⁵466 U.S. 777-778. Like the Elkhorn litigation, the Escondito case involved a challenge to water quantity conditions on a FERC license. In Escondito, the Secretary of Interior imposed conditions which required certain Indian tribes to be allotted an amount of water that the licensee (Escondito Mutual Water Co.) otherwise would have been entitled to. 466 U.S. at 772. The Supreme Court held that FPA § 4(e) plainly commands FERC to accept without modification conditions that the Secretary of Interior deems necessary for the adequate protection and utilizations of the Indian reservations. 466 U.S. at 772-781.

¹⁶⁶Respondents' Brief at 33, PUD No. 1 (No. 92-1911).

way for any FERC licensed hydropower projects on public lands.¹⁶⁷ This provision legislatively overturned the Ninth Circuit ruling in California and Henwood Associates Inc. v. FERC, 966 F.2d 1541, 1561 (9th Cir. 1992), which said the Bureau of Land Management had no authority to require such right of way permits. Legislative history supporting the amendment of FLPMA § 501(a)(4) indicates that the Bureau of Land Management and the Forest Service may require conditions "to assure that the use . . . would not substantially degrade the natural and cultural resources of the affected lands."¹⁶⁸

Respondents' position was also bolstered by the fact that Congress has limited FERC's power in statutes other than the FPA, CWA or FLPMA. One example is the Fish and Wildlife Coordination Act.¹⁶⁹ Congress, in section 811 of the Fish and Wildlife Act,¹⁷⁰ vacated a FERC promulgated rule that narrowly interpreted "fishway" and stated that any future FERC promulgated rule "shall have no force and effect unless concurred in by the Secretaries of Commerce and

¹⁶⁷See FLPMA § 501 *et seq.*, 43 U.S.C. § 1761 *et seq.*, as amended by P.L. 102-486, 106 Stat. 3096-3097, Tit. XXIV, § 2401.

¹⁶⁸See H.R. Rep. No. 474 (VIII), 102 Cong., 2d Sess. 153 (1992).

¹⁶⁹16 U.S.C. § 661 *et seq.* (1988).

¹⁷⁰*Id.* and § 811, as amended by P.L. 102-486, 106 Stat. 3008, Title XVII, § 1701(b).

Interior.¹⁷¹ The requirements and prohibitions of the Endangered Species Act¹⁷² and the Wild and Scenic Rivers Act¹⁷³ also apply to FERC licensed projects.

The Respondents viewed the language of CWA § 401 as the key in this case.¹⁷⁴ They argued that although Congress may have given FERC the primary role in the licensure of federal hydroelectric projects, it also gave the states a critical role to play through § 401.¹⁷⁵ State certification is a critical part of the license approval process and it applies to all projects that may involve discharges. Because hydroelectric projects are built in water, Respondents argued they will, by definition, involve some discharges into the water.¹⁷⁶ The legislative history of CWA § 401 supports this common sense conclusion:

This section is substantially section 21(b) of existing law . . . [Section 401] continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a federal license or permit from issuing to a discharge source within

¹⁷¹The Ninth Circuit has held that FERC must comply with the Fish and Wildlife Coordination Act. *Washington State Dept. of Fisheries v. FERC*, 801 F.2d 1516 (9th Cir. 1986). The Supreme Court, in 1967, ruled that the Federal Power Commission (FERC's predecessor) must consider the effects of a hydroelectric project on wildlife conservation. *Udall v. FPC*, 386 U.S. 428 (1967).

¹⁷²16 U.S.C. § 1531 *et seq.* (1982).

¹⁷³16 U.S.C. § 1271 *et seq.* (1977).

¹⁷⁴Respondents' Brief at 12-13, PUD No. 1 (No. 92-1911).

¹⁷⁵*Id.*

¹⁷⁶Respondents' Brief at 33, PUD No. 1 (92-1911).

such State or jurisdiction of the interstate agency. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, **Federal Power Commission**, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction (emphasis supplied).¹⁷⁷

The State certification requirement is considered by Congress to be one of the cornerstones of water pollution control. That is evidenced by the fact that the certification requirement predates the 1972 Federal Water Pollution Control Act that subsequently became the Clean Water Act. It first appeared in section 21(b) of the Water Quality Improvement Act of 1970 ("WQIA").¹⁷⁸ Senator Edmond Muskie of Maine was one of the primary architects and sponsors of the Act.¹⁷⁹ Senator Muskie characterized the State certification requirement as "the most important section" of the Water Quality Improvement Act of 1970, and added:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.¹⁸⁰

¹⁷⁷See the Senate Report on the Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971), reprinted in 2 USCCAN 3735 (1972).

¹⁷⁸P.L. 91-224.

¹⁷⁹See, *New Hampshire v. Atomic Energy Commission*, 406 F.2d 170, 176 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969).

¹⁸⁰Cong. Rec. Senate, p. 8984, March 24, 1970.

Congress carried over the WQIA § 21(b) certification requirement into § 401 of the Federal Water Pollution Control Act Amendments of 1972¹⁸¹ In 1972, Congress understood and intended that section 401 could be used by the States to block hydroelectric projects licensed under the authority of the FPA. As written earlier in this section of the thesis, the Senate noted the ". . . authority of the State . . . to act to deny a permit from issuing to a discharge source within such State . . ."¹⁸²

3. The Supreme Court Majority Opinion

Both Petitioners and Respondents alike expended considerable effort in their briefs to the U.S. Supreme Court debating the meaning of various CWA provisions (such as § 401) and how they interact with the relevant FPA provisions in this

¹⁸¹33 U.S.C. §§ 1251-1387; The Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), Pub. L. No. 92-500, approved October 18, 1972, 86 Stat. 816. It has been called the "Clean Water Act" since 1972. The first Clean Water Act was enacted in 1948. Pub. L. No. 845, approved June 30, 1948, 62 Stat. 1155. It has grown incrementally since that time. The first significant amendments were the Water Quality Act of 1965, Pub. L. No. 89-234, approved October 2, 1965, 79 Stat. 903; the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, approved April 3, 1970, 84 Stat. 91; the FWPCA; and the CWA. The current Clean Water Act is the most comprehensive federal water pollution statute. A good thumbnail analysis of the Clean Water Act and its predecessors can be found in D. Tarlock, J. Corbridge, Jr., D. Getches, Water Resources Management: A Casebook in Law and Public Policy 132-135 (4th ed. 1994).

¹⁸²Senate Report on the Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971), reprinted in 2 USCCAN 3735 (1972).

case. Petitioners relied heavily on FPA §§ 4 and 10 to assert that the Washington minimum flow requirement interfered with FERC's "comprehensive" authority to license hydroelectric projects.¹⁸³ The Supreme Court, in determining Congress' intent, focused almost exclusively on the CWA. Justice O'Connor, writing for the majority, addressed FERC's alleged "comprehensive" authority under the FPA only briefly at the end of her opinion.¹⁸⁴ The Associate Justice then proceeded to summarily eviscerate the Petitioners' argument.

Justice O'Connor noted that in California v. FERC,¹⁸⁵ the Court held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow that conflicted with minimum stream flows contained in a FERC license.¹⁸⁶ The Supreme Court in that case opined that the FPA did not save this authority to the states.¹⁸⁷ The Court here distinguished California v. FERC and found no such conflict with FERC licensing authority in the Elkhorn litigation.¹⁸⁸

¹⁸³Petitioners' Brief at 46, PUD No. 1 (92-1911).

¹⁸⁴PUD No. 1, 114 S.Ct. at 1914.

¹⁸⁵495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed. 474 (1990).

¹⁸⁶PUD No. 1, 114 S.Ct. at 1914.

¹⁸⁷California v. FERC, 495 U.S. at 498.

¹⁸⁸PUD No. 1, 114 S.Ct. at 1914.

Justice O'Connor wrote that FERC had not yet acted on Petitioners' application and that it was possible that FERC might even eventually deny the application.¹⁸⁹ The Court also speculated that alternatively, FERC might impose the same conditions as Washington's CWA § 401 certification. The Washington Supreme Court, using more detailed analysis, came to the same conclusions.¹⁹⁰ As referenced earlier, the Supreme Court also mentioned that the Solicitor General said in oral argument that it represented both EPA and FERC and that the government had no objection to the minimum stream flow condition.

Finally, the court puts this issue to rest by noting that the state certification requirement under CWA § 401 applies not only to FERC licenses but to all federal licenses and permits. The Court illustrates several examples to make its point.¹⁹¹

For instance, an Army Corps of Engineers permit is needed for the installation of any structure in the navigable waters of the U.S. that may interfere

¹⁸⁹*Id.*

¹⁹⁰The Washington Supreme Court shot down Petitioners' preemption argument by distinguishing *California v. Federal Energy Regulatory Comm'n* on two grounds. It said there was a conflict in that case because FERC and the California Water Resources Control Board had both issued orders regarding streamflow, and those orders were in conflict. The court added that no such conflict existed in the Elkhorn litigation (because FERC never acted on the application). The court also noted that in *California v. Federal Energy Regulatory Comm'n*, the Clean Water Act was not at issue or even mentioned. *State, Dept. of Ecology v. PUD No. 1*, 849 P.2d 646, 656 (1993).

¹⁹¹*Id.*

with navigation, including piers, docks and ramps.¹⁹² Another example highlighted by the Court is the CWA § 404 permit issued by the Corps for discharge of dredge and fill material.¹⁹³ Finally, the Court noted that the Secretaries of Interior and Agriculture issue permits for the construction of reservoirs, canals and other water storage systems on federal land.¹⁹⁴

The Court concludes, "Because § 401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into § 401."¹⁹⁵

Justice Thomas, in his thoughtful dissent, points out that the Court's interpretation of § 401 "significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA)."¹⁹⁶ He reminded the Majority that California v. FERC,¹⁹⁷ reaffirmed the Court's decision

¹⁹²*Id.* See also Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, 33 U.S.C. § 403.

¹⁹³*Id.* See also 43 U.S.C. § 1761 (1988 ed. and Supp. IV).

¹⁹⁴PUD No. 1, 114 S.Ct. at 1914.

¹⁹⁵*Id.*

¹⁹⁶See PUD No. 1, 114 S.Ct. at 1919.

¹⁹⁷495 U.S. 490.

in First Iowa Hydro-Electric Cooperative v. FPC,¹⁹⁸ in which the Court warned against "vest[ing] in [State authorities] a veto power" over federal hydroelectric projects.

In First Iowa the Supreme Court concluded that such authority could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' planning" with which the administering federal agency was charged.¹⁹⁹ The Dissent states that, in the present case, the Court gives the states "precisely the veto power over hydroelectric projects" that it determined they didn't have in the earlier cases.²⁰⁰ Justice Thomas felt that since it is not disputed that CWA § 401 conditions become a "ter[m] . . . of the license as a matter of law,"²⁰¹ this case marks a real shift of power to the states.²⁰²

¹⁹⁸328 U.S. 152, at 164.

¹⁹⁹Id.

²⁰⁰PUD No. 1, 114 S.Ct. at 1920.

²⁰¹Department of Interior v. FERC, 952 F.2d 538, 548 (CADC 1992).

²⁰²PUD No. 1, 114 S.Ct. at 1920.

B. WHETHER STATE CERTIFICATION AUTHORITY UNDER CWA SECTION 401 IS LIMITED TO DETERMINING WHETHER DISCHARGES FROM FEDERALLY LICENSED HYDROELECTRIC FACILITIES COMPLY WITH EPA-APPROVED WATER QUALITY STANDARDS AND OTHER LIMITATIONS LISTED IN SECTION 401.

1. Petitioners' Position

This issue, like many of the others in the Elkhorn litigation, boils down to one of statutory interpretation. Petitioners assert that the minimum streamflow condition imposed by State DOE is not a valid CWA § 401 condition because no potential discharges from their project would violate applicable CWA sections or the State of Washington's EPA-approved water quality standards.²⁰³

The Washington Supreme Court held that State DOE could impose streamflow conditions in its § 401 certificate, regardless of whether those conditions were necessary to insure compliance with a State-issued and EPA-approved water quality standard.²⁰⁴ The court found that the phrase "any other appropriate requirement of state law" in CWA § 401(d) contains no language to suggest that its reference should be limited only to state water quality standards.²⁰⁵ It interpreted that phrase to include "all state water-quality related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section

²⁰³Petitioners' Brief at 21-30, PUD No. 1 (No. 92-1911).

²⁰⁴State Dept. of Ecology v. PUD No. 1, 849 P.2d at 651.

²⁰⁵Id.

303."²⁰⁶ The Washington Supreme Court, relying on CWA § 401(d), dismissed Petitioners' argument "that water quality standards are limited to pollution and discharges, as opposed to streamflow levels."²⁰⁷

Petitioners had asserted that section 401(a)(1), not § 401(d), defines the scope of Washington's ability to condition licenses.²⁰⁸ According to the Petitioners in their Supreme Court brief, under the plain language of CWA § 401(a)(1), state certification is not required for every federal activity, but only for those that involve a "discharge" into navigable waters of the United States. The word "discharge" appears repeatedly in CWA § 401.²⁰⁹

The language of § 401(a)(1) plainly says that a state is authorized to certify only that a "discharge" will "comply" with the "applicable" provisions of sections

²⁰⁶Id. CWA section 303 deals with water quality standards.

²⁰⁷Id. The court explained that the standards' explicitly stated antidegradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the standards' broad purpose, all demonstrate "a broad concern for water quality, not just with pollution discharges."

²⁰⁸Petitioners' Brief at 22, PUD No. 1 (No. 92-1911).

²⁰⁹The first sentence of CWA § 401(a)(1) reads: "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any **discharge** into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the **discharge** originates or will originate, or if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the **discharge** originates or will originate, that **any such discharge** will comply with the applicable provisions of sections 1311 (301), 1312 (302), 1313 (303), 1316 (306), and 1317 (307) of this title...."

301, 302, 303, 306 and 307.²¹⁰ Each of the terms in § 401(a)(1) limits the scope of certification and the conditions attached thereto to pollutant discharges or effluent limitations. As detailed in the following paragraphs, the same is also true for all of the listed provisions (§§ 301, 302, 303, 306, 307) in CWA § 401. Thus, Petitioners assert that regulation of stream flow is not a regulation of a discharge of pollution and is beyond the purview of § 401.

Section 301, other than establishing the basic prohibition against the discharge of pollutants, does little more than establish effluent limitations that must be met by point sources pursuant to their § 402 permits. There are two types of effluent limitations and the more stringent of the two must be met.

One § 301 effluent limitation is technology based,²¹¹ and the other is based on water quality standards.²¹² Both types of effluent limitations are restrictions on the amounts or concentrations of pollutants. The Federal Water Pollution Act of 1972 made technology-based controls ("TBCs") the primary regulatory tool rather

²¹⁰The Washington Supreme Court relied heavily on § 401(d). That section, however, specifically lists all of the same provisions as § 401(a)(1) with the exception of § 303.

²¹¹See CWA § 301(b)(1)(A) and (B) and (b)(2).

²¹²See CWA § 301(b)(1)(C).

than water quality.²¹³ Congress created a two-part system with TBC supplemented with water quality based controls.

Section 301(b) contains two sets of TBCs for pollutant discharges in subsections (b)(1) and (b)(2). If the lower level of TBCs in § 301(b)(1) does not meet the water quality standards set by the state for the waterbody, then the more stringent limitations in § 301(b)(2) are required.²¹⁴ Section 302(a) requires that water quality related effluent limitations be established if technology based controls fail to achieve water quality standards.

Section 303 of the CWA requires the EPA and the States to establish water quality standards. Under EPA's implementing regulations water quality standards consist of: 1) "the designated uses of the navigable waters involved"; and 2) "the water quality criteria for such waters based upon such uses."²¹⁵ Washington State has identified the Dosewallips River as a Class AA river whose characteristic (designated) uses include fish migration, rearing, spawning and harvesting.²¹⁶ Class AA waters are also subject to specific water quality criteria which define values for

²¹³See *EPA v. California*, 426 U.S. 200, 204, 96 S.Ct. 2022, 2024, 48 L.Ed.2d 578 (1976).

²¹⁴33 U.S.C. § 1311(b)(1)(C) (1988).

²¹⁵33 U.S.C. § 1313(c)(2)(A)(1988); 40 C.F.R. §§ 130.2(d), 130.3, 131.2(i) and 131.3.

²¹⁶WAC 173-201-045(1) (b) (iii).

ascertainable factors such as fecal coliform, dissolved oxygen, dissolved gas, temperature, PH, turbidity, and toxic, radioactive or deleterious material.²¹⁷

The criteria developed to implement CWA § 303 are to support the designated use by limiting the pollutants being discharged in the water so that the designated use can be fulfilled. The provisions of CWA § 303 require EPA and the states to set water quality standards backed up by effluent limitations on pollutants discharged from point sources.

EPA regulations state that § 303 water quality standards must serve the dual purpose of (1) establishing the water quality goals for a specific water body, and (2) providing the regulatory basis for the establishment of water quality based treatment controls and strategies above the technology based levels of treatment required under CWA §§ 301 and 306.²¹⁸ Petitioners assert that while uses must be designated in state water quality standards, including uses for fish and wildlife protection, such uses must be protected by specific criteria based on sound scientific rationale.²¹⁹

CWA § 306 mandates that the Administrator of EPA create "Federal standards of performance for new sources" within various listed categories of

²¹⁷WAC 173-201-045(a)(c).

²¹⁸40 C.F.R. § 131.2 (1992).

²¹⁹Petitioners' Brief at 33, PUD No. 1 (No. 92-1911).

sources such as pulp and paper mills, textile mills, electroplating, petroleum manufacturing, etc.²²⁰ These standards are technology-based and control the amounts or concentrations of pollutants. The only real "difference" between § 306 standards and the § 301 technology-based standards is that the former applies solely to new sources.

Section 307 requires EPA to develop toxic and pretreatment effluent standards.²²¹ The effluent standards in § 307(a) are technology-based and restrict the amount and/or concentrations of toxic pollutants. Section 307(b) establishes pretreatment standards for indirect sources discharging pollutants into publicly owned treatment works ("POTWs"). These standards are mostly technology-based and are promulgated with the § 301(b) technology based controls of effluents in the same regulation.²²²

All of the CWA sections which are those referenced as being applicable in §§ 401(a)(1) and 401(d)) refer to discharges.²²³ Discharge is defined in CWA § 502(16) as follows: "The term 'discharge' when used without qualification

²²⁰33 U.S.C. § 1316(b) (1988).

²²¹33 U.S.C. § 1317 (1988).

²²²40 C.F.R. Pt. 415 (1992). There are pretreatment standards in 40 C.F.R. § 403.5 (1992) that are not technology-based, however, they also restrict amounts or concentrations of pollutants.

²²³See CWA §§ 301, 302, 303, 306, 307.

includes a discharge of a pollutant, and a discharge of pollutants." This "definition" penned by Congress is really no definition at all. The § 502(16) terms "discharge of a pollutant" and "discharge of pollutants" are further defined in § 502 (12).²²⁴ I believe §§ 502(16) and 502(12) provide powerful support for the Petitioners. The word "discharge" is not qualified in § 502(12). Therefore, under the definition in § 502(16), stream flow would not constitute a discharge unless it involved pollutants. Without pollutants, CWA § 401 should not apply.

Petitioners point out that another key word used in § 401(a)(1) is "into". They state that state certification requirements of section 401 are triggered by "any discharge into the navigable waters . . ." that result from federally licensed activity²²⁵ (emphasis supplied). The dictionary definition of "into" says: "used as a function word to indicate entry, introduction, insertion, superposition, or inclusion . . .".²²⁶

Petitioners point out that the Federal Water Pollution Control Act Amendments of 1972 changed the primary mechanism for water pollution control

²²⁴CWA § 502(12): "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

²²⁵These words are contained in the first sentence of CWA § 401(a)(1).

²²⁶See Webster's Ninth New Collegiate Dictionary 634 (1989).

from ambient water quality standards to a system for eliminating the discharge of pollutants into the waters of the United States.²²⁷ The regulation of discharges is the primary strategy for controlling water pollution in the CWA.

Section 301(a)²²⁸ contains the central prohibition of the CWA and is very broad in scope. It prohibits the **discharge** of any pollutant by any person except in compliance with § 301, and other listed sections including §§ 302, 306, 307, 318, 402, and 404.²²⁹ Section 301(a) is the basic regulatory prohibition in the CWA. When read together with the § 502(12) and § 502(16) definitions, CWA § 301 prohibits the **addition** (or discharge **into** the waters of the United States) of a pollutant to navigable waters from a point source without a permit or in violation of permit conditions.

Under CWA § 402, EPA or a state with an EPA-approved program may issue permits to discharge pollutants from "point sources"²³⁰ that meet other

²²⁷Brief for the Petitioners, PUD No. 1 at 23-24; *see* EPA v. California, 426 U.S. 200, 202-208, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976); Arkansas v. Oklahoma, 503 U.S. ___, 112 S. Ct. 1046, 1054-1055, 117 L.Ed.2d 239 (1992).

²²⁸33 U.S.C. § 1298 (1988); effluent limitations.

²²⁹33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, and 1344 (1988).

²³⁰CWA § 502(14), 33 U.S.C. § 1362, defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . . from which pollutants are or may be discharged. . . ."

requirements in the CWA. Neither side asserted in their pleadings that the Elkhorn Project was a "point source".

The U.S. Court of Appeals for the District of Columbia has recognized this distinction by holding that discharges from a private (non-federal) dam that may change the chemical and temperature composition of a stream are not "discharges" of pollutants. Subject to CWA § 402 requirements, discharges from dams that don't add anything to the water from outside the water are not subject to § 402 because § 502(12) requires an "addition" to the water. The court thus refused to order EPA to require CWA § 402 NPDES²³¹ permits for such dam discharges.²³²

CWA § 404, the other control system under the Act, authorizes the Corps of Engineers to issue permits for the addition of dredged or fill material into navigable waters at specified disposal sites whether or not from a point source.²³³ Such discharges without a § 404 permit are illegal.²³⁴

²³¹33 U.S.C. § 1342 (1988); "NPDES" is the acronym for the National pollutant discharge elimination system outlined in CWA § 402.

²³²National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982). *See also* National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988).

²³³Corps regulations implementing the § 404 permit program do not limit the program to point sources. Any addition of dredged or fill material to the waters of the U.S. requires a Corps § 404 permit. 33 C.F.R. § 323.2 (1991).

²³⁴33 U.S.C. § 1311(a) (1988).

Petitioners pointed out that CWA § 402 and § 404 permits require § 401 state certifications because both types of permits are discharge control systems.²³⁵ Therefore, the Corps of Engineers does not require § 401 certificates for permitted activities (under CWA § 404 and other statutes) that could not reasonably result in discharges.²³⁶

Petitioners concede that hydroelectric facilities may fall within the scope of § 401 in two ways.²³⁷ First, the construction may result in the discharge of dredge or fill material into a "navigable stream" necessitating a CWA § 404 permit and an accompanying § 401 certificate. The second involves the discharge of water when water is released or emitted after being blocked or removed from the river. Petitioners contend, however, that § 401 is intended to regulate quality, not quantity of water. They contend it simply does not apply if the waters that are discharged from a hydroelectric project are unchanged from what went in.²³⁸ Therefore, the

²³⁵Petitioners' Brief at 25, PUD No. 1 (No. 92-1911).

²³⁶33 C.F.R. § 330.4(c)(3), n.1 (1991).

²³⁷Petitioners' Brief at 27-28, PUD No. 1 (No. 92-1911).

²³⁸Petitioners' Brief at 29, PUD No. 1 (No. 92-1911) *citing* National Wildlife Federation v. Consumers Power Co., 862 F.2d 580, 581 (6th Cir. 1988). In Consumer Power, the National Wildlife Federation brought suit against a hydroelectric plant to stop discharge of dead fish remains in turbine generated water. The Sixth Circuit held that the facility's movement of pollutants already in the water was not "addition of pollutants" to navigable waters so as to require a CWA § 402 permit. *See also* National Wildlife Federation v. Gorsuch, *supra*.

Petitioners conclude that a State may not impose a condition solely on stream flow in a CWA § 401 certification.

2. Respondents' Position

Petitioners' basic argument on this issue is that the State of Washington went too far when it imposed a minimum stream flow condition because any harm caused by the Elkhorn Project's diversion of water will not be the result of a discharge.²³⁹ Respondents first tried to dispose of this argument procedurally by pointing out to the Court that the petitioners never raised this issue in a lower court.²⁴⁰ The Supreme Court chose in its opinion to address this argument on the merits rather than disposing of it procedurally as desired by the Respondents.

Respondents argued that § 401's unqualified use of the word "discharge" is clear evidence that it authorizes states to fully examine all discharges from any federally licensed activity.²⁴¹ Respondents' use of the word "unqualified" plays into the Petitioners' definition of discharge argument under § 502. Respondents pointed out that Congress uses "activity" and "discharge" interchangeably throughout § 401.²⁴² Respondents also alleged that the CWA's legislative history suggests that

²³⁹Petitioners' Brief at 21-30, PUD No. 1 (No. 92-1911).

²⁴⁰Respondents' Brief at 28, PUD No. 1 (No. 92-1911).

²⁴¹Respondents' Brief at 30, PUD No. 1 (No. 92-1911).

²⁴²Respondents' Brief at 30-31, PUD No. 1 (No. 92-1911).

the states should review all discharges causing pollution resulting from a proposed activity.

Section 401 of the CWA was based almost verbatim on § 21(b) of the Water Quality Improvement Act of 1970 that also required state certifications for every federally licensed "activity . . . which may result in any discharge into navigable waters." ²⁴³

Petitioners highlighted the fact that Congress did make one major change. When enacting the new § 401, Congress chose to change the wording of § 21 by expressly replacing the word "activity" with the word "discharge".²⁴⁴ Petitioners asserted that changing the term activity to discharge constituted a major substantive change by Congress which narrowed the scope of state certifications under the new section 401 of the Clean Water Act from the broader wording of § 21(b).²⁴⁵

Respondents countered that there is no proof that Congress, in making this change, perceived any difference between certifications addressing the water-quality effect of an activity vice a discharge. Respondents argued that Congress uses

²⁴³Pub. L. No. 91-224, 84 Stat. 91 (1970). Section 21(b) of the FWPCA authorized the State to certify "that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards." (emphasis supplied).

²⁴⁴*Id.*

²⁴⁵Petitioners' Brief at 26-27, PUD No. 1 (No. 92-1911).

"activity" and "discharge" interchangeably in § 401.²⁴⁶ In fact, the second sentence of § 401(a)(1) uses the word "activity" instead of "discharge" which is used in the preceding sentence. It says "[i]n the case of any such **activity** for which there is not an applicable effluent limitation or other limitation, . . . and there is no applicable standard . . . , the State shall so certify."²⁴⁷ (emphasis supplied.)

They argued that this interchangeable use of "activity" and "discharge" in § 401, plus the legislative history indicate Congress' intent not to reduce the States' previously granted authority to look at all of the possible impacts a project might have on water quality.²⁴⁸ This assertion is bolstered by the conference report of the 1977 amendments to the CWA. Congress again amended § 401 in 1977 and the conference report described the section as still requiring that a "federally licensed or permitted **activity** . . . must be certified to comply with State water quality standards."²⁴⁹ (emphasis supplied.)

Respondents also cited other legislative history to bolster their contention that Congress didn't differentiate between certifications addressing the water quality effects of an "activity" vice a "discharge". The Senate and House reports

²⁴⁶Respondents' Brief at 30-32, PUD No. 1 (No. 92-1911).

²⁴⁷See 33 U.S.C. § 1341(a)(1) (1988).

²⁴⁸Respondents' Brief at 30-31, PUD No. 1 (No. 92-1911).

²⁴⁹H.R. Conf. Rep. No. 830, at 96 (1972).

underlying the amendments consistently state that § 401 was substantially the same as its predecessor, § 21(b).

The Senate Report said § 401 "is substantially section 21(b) of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."²⁵⁰ The House Report said "[s]ection 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act."²⁵¹

The EPA, in statements, regulations and guidance documents, has also consistently supported Respondents' broader construction of a state's certification authority under § 401. EPA has never taken the Petitioners' position that state certifications are limited to considering the impacts of the impacts of narrowly defined "discharges". LuJuana Wilcher, EPA Assistant Administrator, made the above clear in a Jan. 18, 1991, letter to the Hon. Lois Cashell, Secretary of FERC.

She wrote:

[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of the multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands, and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include the toxicity

²⁵⁰See S. Rep. No. 414, at 69 (1972).

²⁵¹See H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972).

and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrological changes.²⁵²

Martha G. Prothro, Deputy Assistant Administrator for Water, EPA, made a statement before the Subcommittee on Environment, Energy and Natural Resources, of the House of Representatives on May 15, 1992.²⁵³ She said "[s]tates are authorized to issue, condition, deny, or waive certification of certain Federal permits or licenses that may affect the physical, chemical, or biological integrity of our waters.²⁵⁴

EPA regulations and guidance documents also support the broad interpretation of § 401 asserted by the two high ranking EPA officials above. 40 C.F.R. § 121.2(a)(3) is the EPA regulation that implements CWA § 401. It says that the state must certify that the federally licensed "activity will be conducted in a manner which will not violate water quality standards."²⁵⁵

²⁵²See State Dept. of Ecology v. PUD No. 1, 849 P.2d 646, 649 (Wash. 1993).

²⁵³See The Federal Energy Regulatory Commission's Hydropower Licensing Program: Hearing Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations, 102d Cong. 2d Sess. 91 (1992).

²⁵⁴ *Id.*

²⁵⁵See also Respondents' Brief at 32, PUD No. 1 (No. 92-1911).

EPA's formal guidance also supports a broad construction of a state's conditioning authority under § 401. That guidance provides:

... because the States' certification of a construction permit or license also operates as certification for an operating permit, . . . it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project [A]ll of the potential effects of a proposed activity on water quality -- direct and indirect, short and long term, upstream and down-stream, construction and operation -- should be a part of a State's certification review.²⁵⁶

EPA is the federal agency that administers the Clean Water Act. Even assuming the CWA was ambiguous, the EPA's interpretation is clearly entitled to deference.²⁵⁷

Respondents cited the statutory and regulatory support above to support their contention that Congress intended that states, under § 401, must thoroughly examine "all of an activity's discharges and the water pollution" caused by those discharges.²⁵⁸ In that way respondents contend that Congress authorized states to

²⁵⁶See EPA, Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes 22-23 (April, 1989). See also, Respondents' Brief at 32, PUD No. 1 (No. 92-1911).

²⁵⁷See *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S. Ct. 1046, 1059, 117 L.Ed.2d 239 (1992); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

²⁵⁸Respondents' Brief at 32, PUD No. 1 (No. 92-1911).

examine all of the water quality impacts of federally licensed projects, and to insure that they will comply with state water quality requirements.²⁵⁹

Respondents alleged that the Elkhorn project will produce at least three discharges that fall within § 401.²⁶⁰ They listed (1) discharges of dredged and fill material, (2) discharge of pollutants, and (3) discharges of non-point source pollution.²⁶¹ Respondents concurred with the Petitioners' concession²⁶² that construction of the Elkhorn dam will result in discharges.²⁶³ They also asserted, however, that the dam itself is a discharge (of fill material) by virtue of sitting in the water.²⁶⁴

Respondents added that the dam (qua discharge) itself falls within the scope of § 401 because it produces adverse water quality impacts by reducing the flow of the Dosewallips River.²⁶⁵ The underlying premise of the Respondents' position is that the Congress intended that "water quality" have a broad meaning under the

²⁵⁹Id.

²⁶⁰Id.

²⁶¹Id.

²⁶²Petitioners' Brief at 28, PUD No. 1 (No. 92-1911).

²⁶³The construction related discharges will require a Corps of Engineers CWA § 404 permit which will also require a State CWA § 401 certification.

²⁶⁴Respondents' Brief at 33, PUD No. 1 (No. 92-1911).

²⁶⁵Respondents' Brief at 34, PUD No. 1 (No. 92-1911).

CWA. They cited to the broad CWA definition of water pollution in CWA § 502(19) to bolster their position that protection of water quality involves more than just addressing water chemistry.²⁶⁶

CWA § 502(19) defines water "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."²⁶⁷ The EPA's broad interpretation (outlined above) of the scope of the CWA and § 401 also bolster the Respondents' position.

Respondents pointed out that the third possible discharge is the operation of the dam. Petitioners conceded that ". . . dams . . . contain other mechanisms for releasing water into the stream below, including such devices as crest-gates, sluice gates, and release valves that may be used to reduce pressure behind the dam, spill water over the top during high water or to allow for maintenance on the turbine facility."²⁶⁸ Congress uses the word "discharge" without qualification in § 401 versus "discharge of any pollutant" which is used in other sections of the CWA.²⁶⁹

²⁶⁶Id.

²⁶⁷33 U.S.C. § 1362(19) (1988).

²⁶⁸Petitioners' Brief at 28 n.20, PUD No. 1 (No. 92-1911).

²⁶⁹See, e.g., 33 U.S.C. §§ 1311(a) (Illegality of pollutant discharges except in compliance with law); 1311(h) (Modification of secondary treatment requirements); 1312 (Water quality related effluent limitations); 1316(a)(1) (National standards of performance); 1323(a) (Federal facilities pollution control); 1342(a)(1) (NPDES).

Thus, when water is released as Petitioners described, a discharge occurs. Respondents alleged that this water will be significantly different than the water behind the dam with minor physical and chemical changes such as turbidity levels, dissolved gas concentrations, etc.²⁷⁰ In addition, the major alteration will be the reduction in stream flow of the Dosewallips.²⁷¹

Respondents concluded that all of the above changes are man-induced alterations of the water's chemical, physical, and biological integrity, and thus constitute pollution under CWA § 502(19). Therefore, the operation of the dam may result in discharges of pollution which the minimum flow requirement tried to address.²⁷²

3. The Supreme Court Opinion

The Supreme Court rejected Petitioners' assertion that the minimum stream flow condition imposed by Washington was unrelated to any discharges, and that as a consequence, Washington lacked the authority under § 401 to condition the flow to protect the fishery.²⁷³ The Court conceded that § 401(a)(1), when

²⁷⁰Respondents' Brief at 34, PUD No. 1 (No. 92-1911).

²⁷¹Id.

²⁷²Id.

²⁷³PUD No. 1, 114 S.Ct. at 1908.

interpreted by itself, lends support to petitioners' argument.²⁷⁴ The Court made that concession because § 401(a)(1) refers to a certification from a state that a **discharge** will comply with certain listed provisions of the CWA.

In the Court's opinion, however, § 401(d) expands the state's authority. Justice O'Connor wrote that § 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that **any applicant**" will comply with various provisions of the CWA and appropriate state requirements.²⁷⁵

Justice O'Connor noted that § 401 refers to the compliance of the **applicant**, not the discharge. Therefore, § 401(d) "allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the CWA and with 'any other appropriate requirement of State law.'"²⁷⁶

Justice Thomas, in his dissent, took issue with the Court's interpretation that § 401(d)'s reference to an applicant's compliance expanded the state's authority beyond the limits set in § 401(a).²⁷⁷ Thomas argued that the majority's

²⁷⁴ Id.

²⁷⁵ Id.

²⁷⁶ Id.

²⁷⁷ The Court concedes that CWA § 401(a), read by itself, appears to authorize states to impose conditions related only to discharges and not activities. *See PUD No. 1*, 114 S.Ct. at 1908.

interpretation would permit the state to look at an applicant's activity as a whole versus limiting the scrutiny to discharges that may result from the activity.

Justice Thomas asserted that in order to determine the nature of the conditions permissible under § 401(d), that § 401 must be read as a whole.²⁷⁸ He stated that "[I]t is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve."²⁷⁹ Thus, conditions imposed in the state certification under the authority of § 401(d) should still be related to discharges or § 401(a)(1) will be swallowed by § 401(d).

The majority also deferred to EPA's interpretation of the statute. Justice O'Connor cited 40 C.F.R. § 121.2(a)(3) which requires the state to find that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."²⁸⁰

²⁷⁸ PUD No. 1, 114 S.Ct. at 1916, citing United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988) (statutory interpretation is a "holistic endeavor").

²⁷⁹ Id.

²⁸⁰ Id. The Court deferred to EPA's interpretation of the CWA. The Supreme Court also cites for support EPA guidance in the EPA, Wetlands and 401 Certification, p 23.

Justice Thomas faulted the Court for deferring to EPA without making the preliminary determination that the text of CWA § 401 is ambiguous.²⁸¹ He further notes that the Solicitor General did not seek deference for EPA's regulation and that the only EPA regulation²⁸² that directly addresses the conditions that may appear in a section 401 certification speaks in terms of limiting discharges.²⁸³

Even though § 303 is not specifically listed in § 401(d), the Supreme Court majority agreed with Respondents that ensuring compliance with § 303 water quality standards is a proper function of a state § 401 certification.²⁸⁴ While § 303 is not specifically listed in § 401(d) the CWA permits states to impose limitations to ensure compliance with § 301 of the CWA. The Court noted that § 301 incorporates § 303 by reference.²⁸⁵

²⁸¹PUD No. 1, 114 S.Ct. at 1917.

²⁸²The EPA, in 40 C.F.R. § 121.2(a)(4), says a CWA § 401 certification shall contain "[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the **discharge** of the activity. (emphasis added by author).

²⁸³PUD No. 1, 114 S.Ct. at 1917.

²⁸⁴Id.

²⁸⁵The Court references for support 33 U.S.C. § 1311(b)(1)(C); it also cites H.R. Conf. Rep. No. 95-830, p.96 (1977), U.S. Code Cong. & Admin. News 1977, pp. 4326, 4471 ("Section 303 is always included by reference where section 301 is listed").

The Court added that "limitations to assure compliance with State water quality standards are also permitted by § 401(d)'s reference to 'any other appropriate requirement of state law."²⁸⁶ Justice O'Connor refused to speculate what additional state laws, if any, might be appropriate.²⁸⁷ She pointed out, however, that at a minimum, limitations imposed pursuant to § 303 state water quality standards are "appropriate" requirements of state law.²⁸⁸

Section 401(d) begins by stating that any certification shall ensure compliance with four listed CWA provisions (§§ 301, 302, 306, 307), all of which describe discharge-related limitations. Justice Thomas took notice of the fact that the final term, "appropriate requirement[s] of state law" appears after these specific limitations.²⁸⁹ He employs the principle of *ejusdem generis* to suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that impose discharge-related restrictions.²⁹⁰

²⁸⁶PUD No. 1, 114 S.Ct. at 1909.

²⁸⁷Id.

²⁸⁸Id.

²⁸⁹PUD No. 1, 114 S.Ct. at 1917.

²⁹⁰Id. See *Cleveland v. United States*, 329 U.S. 14, 18, 67 S.Ct. 13, 15-16, 91 L.Ed 12 (1946) ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); See also *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84, 111 S.Ct. 415, 421-422, 112 L. Ed.2d. 374 (1990).

C. WHETHER CWA SECTION 303 REQUIRES THE STATE TO PROTECT DESIGNATED USES SOLELY THROUGH IMPLEMENTATION OF SPECIFIC CRITERIA, NOT USES.

1. Petitioners' Position

Petitioners assert that the plain language of § 303(c) makes "criteria", not "uses", the regulatory basis for determining compliance with state water quality standards.²⁹¹ In their eyes, section 303(c)(2)(A) clearly says that in order to obtain EPA approval under § 303(c), state standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses . . .".²⁹²

Petitioners note that § 302(c)(2)(A) also requires that such standards be "established taking into consideration their use and value for . . ." an open-ended list of water uses, including specifically, the propagation of fish and wildlife. *Id.* Thus, Petitioners argue that under the terms of § 303(c)(2)(A), the "criteria" provide the actual regulatory requirements and the designated "uses" provide water quality goals that the criteria are designed to protect.²⁹³

²⁹¹Petitioners' Brief at 31, PUD No. 1 (No. 92-1911).

²⁹²*Id.*

²⁹³Petitioners' Brief at 32, PUD No. 1 (No. 92-1911).

Petitioners claim that EPA regulations support their argument.²⁹⁴ EPA's regulations pertaining to state water quality standards under CWA § 303 impose a three-part framework on the states: designation of uses;²⁹⁵ protection of the designated uses through adoption of the criteria;²⁹⁶ and protection from degradation.²⁹⁷

Water quality goals, such as protection of fish and fish habitat, should be achieved through objective, scientifically based criteria.²⁹⁸ The Petitioners concede that EPA allows criteria to be either numeric or narrative, but state that EPA regulations require that all criteria still must be supported by "sound scientific rationale."²⁹⁹ Petitioners conclude that only objective criteria can provide the regulators and regulatees with guidance while uses are only societal objectives.³⁰⁰

²⁹⁴Petitioners' Brief at 33, PUD No. 1 (No. 92-1911).

²⁹⁵40 C.F.R. §§ 131.2(1992), 131.6(a)(1992), 131.10(1992).

²⁹⁶40 C.F.R. §§ 131.2(1992), 131.3(b)(1992), 131.6(c)(1992), 131.11(a)(1992).

²⁹⁷40 C.F.R. §§ 131.6(d)(1992) and 131.12(1992).

²⁹⁸See 40 C.F.R. §§ 131.2(1992), 131.5(1992), 131.6(1992), 131.10(1992), 131.11(1992).

²⁹⁹Petitioners' Brief at 33, PUD No. 1 (No. 92-1911). 40 C.F.R. § 131.11(1992).

³⁰⁰Petitioners' Brief at 34, PUD No. 1 (No. 92-1911).

2. Respondents' Position

Respondents argue that the state must ensure compliance with all of its water quality standards, not just the water quality criteria. The State WQS upon which the State of Washington bases its instream flow requirement is the State's antidegradation policy.³⁰¹ EPA intends its antidegradation policy to prevent harm to existing uses (such as salmon and trout use of the Dosewallips River).³⁰²

EPA regulations define the minimum requirements for State WQS. 40 C.F.R. § 131.6(1992) requires that WQS include:

- (a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.
- ...
- (c) Water quality criteria sufficient to protect the designated uses. [and]
- (d) An antidegradation policy consistent with 40 C.F.R. § 131.12(1992). (emphasis added by author).

Respondents point out that EPA requires Washington and the other states to include an antidegradation policy in their water quality standards. That antidegradation policy requires that existing uses be maintained. The Solicitor

³⁰¹ Respondents' Brief at 19, PUD No. 1 (No. 92-1911).

³⁰² 40 C.F.R. § 131.12 contains EPA's antidegradation policy, which protects existing uses. Each state must adopt an antidegradation policy that will protect and maintain the water quality necessary to protect existing instream uses. In the case of propagation of fish, wildlife, etc., the quality of the water must be maintained even if it exceeds levels needed to protect those uses. There is a limited exception where the state finds that allowing lower water quality is necessary to protect important economic or social uses. See 40 C.F.R. § 131.12(a)(1) and (2) and Respondents' Brief at 22, PUD No. 1 (No. 92-1911).

General concurred with that position and pointed out in his brief that Congress, in a 1987 amendment to CWA § 303, recognized that antidegradation policies were an essential part of water quality standards.³⁰³

The Solicitor General also points out that narrative water quality criteria (which are highly analogous to antidegradation policies), are frequently expressed in narrative terms such as "there shall be no discharge of toxic pollutants in toxic amounts."³⁰⁴ In Arkansas v. Oklahoma, the Court, albeit in another context, repeatedly refers to the antidegradation policy as being part of the State's water quality standard.³⁰⁵

The Respondents conclude that the antidegradation policy is a "water quality insurance policy" to be used where water quality criteria fail to address the water quality impacts of certain activities.³⁰⁶

³⁰³Brief for United States at 20-21, PUD No. 1 (No. 92-1911). The amendment stated that "any effluent limitation . . . established under this section . . . may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." 33 U.S.C. 1313(d)(4)(B).

³⁰⁴Brief for United States at 18, PUD No. 1 (No. 92-1911). *See also* American Paper Institute, Inc. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1993).

³⁰⁵503 U.S. ___, 112 S. Ct. 1046, 1058 n.13, 1059 (1992).

³⁰⁶ Respondents' Brief at 24, PUD No. 1 (No. 92-1911).

3. The Supreme Court

The Supreme Court disagreed with Petitioners' interpretation of § 303 that states can protect designated uses (e.g. salmon and trout migration, rearing, spawning, and harvesting) only through specific numerical criteria.³⁰⁷ It held that Washington's water quality standards were "appropriate" requirements of state law under § 401(d) and upheld the minimum stream flow condition as necessary to ensure compliance with a "designated use".³⁰⁸

The Court believed that under CWA § 303, water quality standards consist of two components, designated uses of the navigable waters involved and the water quality criteria.³⁰⁹ Therefore, pursuant to § 401(d) the states may require that federally licensed hydroelectric projects be consistent with both components.

Justice Thomas, in his dissent, disagreed with the majority's view that the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria.³¹⁰ He asserted that EPA's regulations

³⁰⁷PUD No. 1, 114 S.Ct. at 1910.

³⁰⁸Id.

³⁰⁹Id.

³¹⁰PUD No. 1, 114 S.Ct. at 1918. In fact, Justice Thomas characterizes the Court's view as "contrary to common sense."

implementing § 303³¹¹ suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]."³¹²

Justice O'Connor had cited 40 C.F.R. § 131.3(b)(1992) to support the proposition that EPA has not interpreted § 303 to require states to protect designated uses solely through enforcement of numerical criteria.³¹³ EPA defines criteria as "elements of state water quality standards expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use."³¹⁴

While the Supreme Court recognizes that enforcement of numerical criteria will generally protect the designated uses, the added requirement that activities also comport with the uses gives the states extra insurance.³¹⁵

The dissent feared the problematic consequences of decoupling "uses" and "criteria." The majority wrote that a state may condition its § 401 certification upon any limitations necessary to ensure compliance with the uses of the waterbody. Justice Thomas believed that under the Court's interpretation, once a

³¹¹40 CFR §§ 131.10(a)(1992), 131.11(a)(1)(1992).

³¹²PUD No. 1, 114 S.Ct. at 1918.

³¹³Id., 114 S.Ct. at 1911.

³¹⁴40 C.F.R. § 131.3(b)(1992).

³¹⁵PUD No. 1, 114 S.Ct. at 1911.

state is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.³¹⁶

The Court concurred with the Respondents' and Solicitor General's argument that Washington's minimum stream flow condition was a proper application of the state and federal antidegradation regulations as it ensured that an existing instream water use will be maintained and protected.³¹⁷

Justice O'Connor also summarily dismissed Petitioners' argument that the CWA is concerned solely with water "quality" and not "quantity". She cited the CWA itself to show that reduced stream flow (reduced water quantity) can constitute water pollution. CWA section 502(19) broadly defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."³¹⁸ In addition, § 304(f) recognized that water pollution may result from "changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams."³¹⁹

³¹⁶PUD No. 1, 114 S.Ct. at 1918.

³¹⁷*Id*; *see* 40 C.F.R. § 131.12(a)(1) (1992).

³¹⁸33 U.S.C. § 1362 (19) (1988).

³¹⁹33 U.S.C. § 1314(f) (1988).

Finally, the Court rejected Petitioners' view that CWA §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2), exclude coverage of water quantity from the Act.³²⁰

In the Court's opinion, sections 101(g) and 510(2) of the CWA preserve the authority of the States to allocate water quantity between users; they do not limit the scope of water pollution controls States can impose on water users who have obtained, pursuant to State law, a water allocation.³²¹

³²⁰PUD No. 1, 114 S.Ct. at 1913. Section 101(g) (the Wallop amendment) states "that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Section 510(2) provides that nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters . . . of such states."

³²¹PUD No. 1, 114 S.Ct. at 1913.

V. SUMMARY OF THE ISSUES

The fundamental question in this case was who had authority to set minimum stream flows for the Elkhorn project, FERC or the Washington State Department of Ecology. In my opinion, the primary weakness of the majority's analysis of that key issue in PUD No. 1 was its failure to harmonize its construction of the CWA with the FPA. The majority in PUD No. 1 directed its search for Congress' intent almost exclusively on the provisions of the CWA.³²²

The Court was obliged, of course, to consider the CWA. For one thing, the legislative history behind the CWA clearly indicates that Congress intentionally gave states a central role in controlling potential sources of water pollution, including federal hydroelectric projects.³²³

The Court erred, however, by failing to consider statutory provisions of the FPA that were clearly the key part of the puzzle. Unless a conflict between two

³²²Justice Stevens highlights this fact in his concurring opinion where he chastises Justices Thomas and Scalia. He says:

Not a single sentence, phrase, or word in the **Clean Water Act** purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal laws might require (emphasis supplied). In fact, the Act explicitly recognizes States' ability to impose stricter standards

PUD No. 1, 114 S.Ct. at 1915.

³²³See Senate Report on the Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971), reprinted in 2 USCCAN 3735 (1972).

statutes is irreconcilable, related statutes should be read *in pari materia* to give effect to each statute. "Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible."³²⁴ The Supreme Court has said that courts must "read statutes to give effect to each if we can do so while preserving their sense and purpose."³²⁵

Congress carefully looked at the FPA in 1986 and added the ECPA amendments to ensure that FERC would add environmental concerns to the scale when balancing different interests related to hydropower projects.³²⁶ Prior to enactment of the ECPA amendments, the FPC and FERC regulated hydropower with virtually a free hand, especially after First Iowa Hydro-Electric Cooperative v. FPC.³²⁷

Congress enacted the ECPA in response to FERC's "less than satisfactory history of according environmental factors less weight than power production

³²⁴2A Norman J. Singer, *Sutherland Statutory Construction*, § 51.02 (5th ed. 1994). In the event a statute cannot be interpreted consistently, another principle of statutory construction requires that the most recent statute controls because it is the later expression of the legislature. 2A Norman J. Singer, *Sutherland Statutory Construction* § 51.02 (5th ed. 1994).

³²⁵*Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed. 2d 80 (1981). *See also, Anderson v. Federal Deposit Ins. Corp.*, 918 F.2d 1139, 1143 (4th Cir. 1990).

³²⁶*See supra* note 44 and accompanying text.

³²⁷328 U.S. 152, 66 S.Ct. 906, 90 L. Ed. 1143 (1946).

concerns in licensing.³²⁸ FERC had only itself to blame for the ECPA. FERC's enforcement of the environmental conditions attached to its licenses was very lax and there were many violations by licensees.³²⁹ In some cases, FERC didn't even bother doing any of its own environmental review of its projects.³³⁰

Despite Congress' annoyance with FERC's poor environmental record, it opted not to take away FERC's comprehensive jurisdiction over the licensing of hydroelectric projects. The Energy and Commerce Committee of the House of Representatives report on ECPA stated:

... The Committee believes that the Federal Power Act should be better harmonized with today's environmental values. In reviewing the current provisions of the Act, however, the Committee found that a major rewrite of the Act was not required.³³¹

The ECPA added section 10(j) to the FPA which required that FERC add environmental conditions to its licenses based on **recommendations** of federal and state agencies.³³² Amended section 4(e) of the FPA required FERC to give "equal

³²⁸See H.R. Rep. No. 507, 99th Cong., 2d Sess. at 17 (1986); See also *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989).

³²⁹See U.S. General Accounting Office, *Enforcement of Requirements Imposed on Hydropower Projects Needs Strengthening*, GAO/RCED-88-60.

³³⁰See, e.g. *Olympus Energy Corp.*, 26 F.E.R.C. ¶ 61,407 (1987).

³³¹H.R. Rep. No. 507, 99th Cong. 2d Sess. 17-21 (1986).

³³²See *supra* notes 50-51 and accompanying text.

consideration" to power and non-power values, including protection of fish and wildlife, etc.³³³

ECPA also amended section 10(a) of the FPA by requiring FERC to include non-developmental values in its planning process.³³⁴ Clearly, these sections of the FPA give FERC the authority to decide on (using a balancing test) license conditions related to streamflow

The Supreme Court's failure to adequately consider the FPA defies logic since the ECPA amendments were passed long after CWA § 401 was enacted. The Congress, using the ECPA, increased the States' role in hydro power licensing; however, it specifically reserved FERC's paramount authority. The Court should have attempted to fit its interpretation of CWA § 401 into the larger framework governing the licensing process under the FPA.

As outlined above, I believe the Supreme Court in PUD No. 1 improperly failed to harmonize its construction of the CWA with the FPA, as amended by the ECPA. The majority in PUD No. 1 also erred in disregarding its own precedent. In California v. FERC,³³⁵ the Court unanimously held that the FPA preempts state laws concerning minimum stream flows.

³³³See *supra* note 45 and accompanying text.

³³⁴See *supra* note 46 and accompanying text.

³³⁵495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed. 474 (1990).

California had asserted that FPA § 27, which reserves certain authority regarding proprietary water rights to the states, gave California the authority to impose stream flow conditions to benefit fish and wildlife.³³⁶ The Court was reluctant to overrule First Iowa which had "guided the allocation of state and regulatory authority over hydroelectric projects."³³⁷ The Court explicitly noted that Congress' addition of § 10(j) to the FPA reaffirmed "First Iowa's understanding that the FPA establishes a broad and paramount regulatory role."³³⁸

The majority in PUD No. 1 dodged the tougher issues by claiming that there was not a conflict in this case between FERC and the State of Washington.³³⁹ The Court based this facile claim on the fact that FERC had not yet acted on Petitioners' license application and that it was possible that FERC might reject the Petitioners' application or actually condition it like the State had done.³⁴⁰ As Justice Thomas points out in his dissent, the Court's observations "simply miss the point."³⁴¹

³³⁶ Id. at 495.

³³⁷ Id. at 498.

³³⁸ Id. at 499.

³³⁹ PUD No. 1, 114 S.Ct. at 1914.

³⁴⁰ Id.

³⁴¹ PUD No. 1, 114 S.Ct. at 1920.

Even if FERC had concurred with the state's conditions in this case, Justice Thomas correctly points out that will merely be a "happy coincidence."³⁴² Congress gave FERC a broad mandate to consider and balance many competing interests including electric power needs and the environment. Under CWA § 401, the only mandate is protection of the environment, and not the many other competing interests that Congress believes are important.

The Supreme Court's construction of CWA § 401 ignores Congress' intent expressed in the ECPA which was enacted by Congress years after § 401(d). Even though Congress strengthened the states' role in making conditions on FERC licenses, it left FERC with the final authority to set stream flows.³⁴³ In sum, the Supreme Court's analysis was erroneous.

The Supreme Court in PUD No. 1 also rejected Petitioners' argument that the state's § 401 conditions had to be tied to specific discharges (stemming from project construction, etc.).³⁴⁴ The Court read CWA § 401(d) "as authorizing additional conditions and limitations on an activity as a whole once the threshold condition, the existence of a discharge, is satisfied."³⁴⁵

³⁴²Id.

³⁴³California v. FERC, 495 U.S., at 499, 110 S.Ct., at 2029-2030.

³⁴⁴PUD No. 1, 114 S.Ct. at 1909.

³⁴⁵Id.

The Court conceded that if "§ 401 consisted solely of subsection (a), which refers to a state certification that a 'discharge' will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force."³⁴⁶

The majority continues on to say, however, that subsection (d) expands the State's authority to impose conditions on the certification of a project.³⁴⁷ I concur with the dissent's analysis that CWA § 401 must be read as a whole.³⁴⁸

Section 401(a)(1) governs the scope of the states' certification authority and it references control of discharges. Therefore, if the conditions imposed in the state certification under § 401(d) are not related to discharges, then § 401(a)(1) becomes irrelevant. The majority's strained construction countermands Congress' intent as evidenced in the carefully worded authority of § 401(a)(1).

The Court erred in construing § 401(d) in isolation. The complexity of the CWA mandates that any of its individual subsections be interpreted in harmony with other sections to insure a uniform approach and consistent meaning throughout.³⁴⁹

³⁴⁶PUD No. 1, 114 S.Ct. at 1909.

³⁴⁷Id.

³⁴⁸*See supra* notes 277-279 and accompanying text.

³⁴⁹*See* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204 (1970); NRDC v. EPA, 822 F.2d 104 (D.C. Cir. 1987)

Even a reading of § 401(d) itself supports an interpretation that conditions on state certifications are limited to discharges. The final statement in § 401(d), "appropriate requirement[s] of state law" follows four listed CWA provisions which describe specific discharge-related limitations. I concur with the dissent that the principle of "*ejusdem generis*" requires that the general reference to "appropriate requirements of state law" be construed to extend only to discharge-related requirements.³⁵⁰

The Court also rejected Petitioners' assertion that § 303 requires the State to protect designated uses solely through implementation of specific "criteria".³⁵¹ The majority thought that "the language of § 303 is most naturally read to require that a project be consistent with both components of water quality standards, namely the designated use and the water quality criteria."³⁵²

Of all the positions forwarded by the Supreme Court, I find this one to be the most persuasive.³⁵³ The Court justifies the minimum stream flow condition as

³⁵⁰See *supra* note 290 and accompanying discussion.

³⁵¹PUD No. 1, 114 S.Ct. at 1910.

³⁵²Id.

³⁵³In my opinion, this reasoning still does not authorize states to impose minimum stream flow conditions on FERC licenses for reasons discussed previously at length.

a means to protect a "designated use" (fish habitat) which is part of Washington's water quality standards.³⁵⁴

Petitioners had claimed that designated uses were mere goals that were to be achieved and protected only through the operation of objective criteria.³⁵⁵ However, a plain reading of CWA § 303(c)(2)(a) appears to indicate otherwise. Under that section, a water quality standard must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."³⁵⁶

There is no language in CWA § 303 that says criteria are the only enforceable components of a state's water quality standards. A plain reading of CWA s 401 also offers support for the proposition that designated uses are independently enforceable. Section 401(a)(1) says a state may deny certification if a project will not "comply with applicable sections of sections . . . 303."

In addition, EPA regulations also generally appear to support the independent enforceability of designated uses. For instance, EPA regulations say

³⁵⁴PUD No. 1, 114 S.Ct. at 1910.

³⁵⁵Petitioners' Brief at 32, PUD No. 1 (No. 92-1911).

³⁵⁶33 U.S.C. § 1313(c)(2)(A) (1988).

that "[w]hen criteria are met, water quality will generally protect the designated use."³⁵⁷

I concur with the majority's interpretation that this regulation implicitly recognizes "that in some circumstances, criteria alone are insufficient to protect a designated use."³⁵⁸ In the event a particular criterion (or lack of one) does not protect a designated use, it does not make sense to say the CWA then prevents a state from protecting the use.

The Supreme Court also upheld Washington State's reliance on its EPA-approved antidegradation policy as a basis for imposing a minimum stream flow. As discussed earlier, I believe that under the facts of this case, FERC was granted the authority to set stream flows under the FPA.

However, there is support for the assertion that generally the antidegradation policy is a part of a state's EPA-approved water quality standard and may be used to protect designated uses.³⁵⁹ EPA interprets the purpose of the antidegradation policy to stop states from allowing the degradation of water quality to the detriment of an existing use.³⁶⁰

³⁵⁷40 CFR § 131.3(b) (1992).

³⁵⁸PUD No. 1, 114 S.Ct. at 1911.

³⁵⁹See *supra* note 302 and accompanying text.

³⁶⁰40 CFR § 131.12(a) says that implementation of antidegradation methods (continued...)

Washington's antidegradation policy implements the antidegradation policy of CWA § 303.³⁶¹ Washington's antidegradation policy states: "Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed."³⁶²

If one carries Petitioners' reasoning to its logical conclusion, states would be powerless under § 401 to condition any "non-discharge-related activity" even if that activity would result in the destruction of all of a stream's uses. In this case, that would mean a federal license applicant could conceivably propose to cut off a stream's entire flow and the state would be powerless under § 401 to impose a condition on certification.

I believe that Congress authorized FERC, not the states, to weigh various energy and environmental concerns and then set minimum stream flow conditions in its licenses. I also believe, however, that there is support in the CWA for the proposition that the states can impose § 401 conditions on other federal licenses based on their EPA-approved water quality standards including criteria, designated uses, and an anti-degradation policy.

³⁶⁰(...continued)

"shall, at a minimum, be consistent with the . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."

³⁶¹33 U.S.C. § 1313(d)(4)(B) (1988).

³⁶²WAC 173-201-035(8)(a).

VI. IMPACTS OF THE CASE

The Supreme Court declined to address whether FERC's license conditioning authority under the FPA preempted the states' authority under CWA § 401 because it felt any conflict in the case was merely "hypothetical."³⁶³ Nevertheless, the Court paved new ground and I believe PUD No.1 will spur renewed interest in CWA § 401 as a tool for protection of the waters of the United States, including wetlands.

One of the most significant aspects of PUD No. 1 was the Supreme Court's recognition of water quantity as an essential element of water quality and related uses. The Court called any attempt to separate water quantity and quality an "artificial distinction" that does not exist in a statute (CWA) that "expressly evinces Congress' concern with the physical and biological integrity of water."³⁶⁴

The majority further wrote that "a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery."³⁶⁵ The decision thus supports state efforts to impose stream flow conditions on federal licenses as a means of protecting designated uses which are an integral part of state water quality

³⁶³PUD No. 1, 114 S.Ct. at 1914.

³⁶⁴PUD No. 1, 114 S.Ct. at 1912-13.

³⁶⁵PUD No. 1, 114 S. Ct. at 1913.

standards. The decision also clearly recognizes that the designated uses component of state water quality standards includes recreational activities, etc.

An EPA official who works closely with state agencies on wetlands issues has said that many states have been hesitant in the past to impose stream flow conditions in their CWA § 401 certifications.³⁶⁶ He believes the Court's language will encourage states to include more of these conditions.³⁶⁷ I believe he is correct.

Before the PUD No.1 decision, sections 101(g) and 510(2) of the Clean Water Act appeared to exclude the regulation of water quantity from the Act.³⁶⁸ The Court, however, found that those sections "preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."³⁶⁹

A Vermont Assistant Attorney General who helped draft the Brief For *Amici Curiae* on behalf of the states in PUD No.1,³⁷⁰ said the case will bolster his State's

³⁶⁶Interview with Benji Ficks, Wetlands Program Analyst, Environmental Protection Agency - Office of Wetlands, Oceans, and Watersheds, in Washington, D.C. (25 July 1994).

³⁶⁷Id.

³⁶⁸33 U.S.C. §§ 1251(g) and 1370(2) (1988).

³⁶⁹PUD No.1, 114 S.Ct. at 1913.

³⁷⁰See *supra* note 13.

efforts to protect designated uses with CWA § 401 stream flow conditions on federal licenses.³⁷¹

Persons in the environmentalist community who have dealt extensively with these issues believe that PUD No.1 was a "big win."³⁷² Katherine Ransel of American Rivers views water quality standards as "an expression of the public trust."³⁷³ She believes the Court's language supports her theory that state water allocation agencies could be forced to equitably reallocate users' water rights if overuse of a waterbody negatively impacts an existing or designated use.³⁷⁴

In view of the Court's language, Ms. Ransel's approach is not farfetched. If pursued, it could lead to some interesting developments. First, EPA could possibly influence state allocations of water by virtue of its role as approving

³⁷¹Telephone Interview with Ronald Shems, Assistant Attorney General, State of Vermont, Office of The Attorney General (1 August 1994).

³⁷²Telephone Interviews with Katherine Ransel, Co-Director, American Rivers, (Jul. 29 and Aug. 1, 1994).

³⁷³Id. For a good discussion of the issues involved in the relationship between the Public Trust Doctrine and a state water rights system *see* National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, *cert. denied*, 464 U.S. 977, 104 S.Ct. 413, 78 L.Ed. 2d 709 (1983). The California Supreme Court held that a party cannot acquire a vested right to appropriate water in a manner harmful to the interests protected by the public trust. Id. The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect the public trust uses wherever feasible. Id.

³⁷⁴Id.

authority of state water quality standards under CWA § 401. Another possibility is that conflicts could develop between state water allocation agencies and state water quality agencies.

How will the Court's decision affect the licensees? The hydroelectric industry feels the FERC hydropower licensing process will be paralyzed and that hydroelectric projects will be severely affected if states impose minimum flow conditions for fish habitat and other items through CWA § 401 certifications.³⁷⁵

A legal advisor with FERC concurred with that assessment and stated that the PUD No. 1 case will encourage states to impose stream flow conditions unrelated to water quality on FERC licenses.³⁷⁶ Between the years 1993 and 2010, FERC will have to relicense 416 hydroelectric projects with a total power capacity of 26,202 megawatts, enough power to serve more than eight million people each year.³⁷⁷ Even though this case arose from an application to build a new hydroelectric project, many states are concerned about the relicensing applications

³⁷⁵See p. 18, Brief of *Amici Curiae*, American Forest & Paper Association, American Public Power Association, Edison Electric Institute, and National Hydropower Association, In Support of Petitioners, PUD No. 1, 114 S.Ct. 1900 (1994)(No. 92-1911).

³⁷⁶Telephone Interview with a Legal Advisor (who did not wish to be identified), Federal Energy Regulatory Commission (July 21, 1994).

³⁷⁷Edison Electric Inst., Statistical Yearbook of the Electric Utility Industry/1991, No. 59, Table 1, p. 7 (Total U.S. 1991 generating capacity) and Table 8, p. 14 (Estimated total U.S. 1991 population).

and will most likely screen them very closely under their CWA § 401 authority.³⁷⁸

Some states have already taken an aggressive stance on these issues.

For example, a New York utility in its brief wrote that the New York State Department of Environmental Conservation ("DEC") took the position several years ago that state statutes governing dam repair and dam safety, as well as those relating to recreation, municipal water, and protection of fish/wildlife are related to water quality.³⁷⁹

The DEC believed such uses had to be enforced in a CWA § 401 certification regardless of their economic impact on a hydroelectric project.³⁸⁰ The utility prevailed in litigation, however, the Supreme Court's decision in PUD No.1 will reopen the debate and encourage states to flex their authority under CWA § 401.³⁸¹

³⁷⁸See *supra* note 14.

³⁷⁹Brief of *Amicus Curiae*, Niagara Mohawk Power Corporation, In Support of the Petitioners at 24, PUD No. 1, 114 S.Ct. 1900 (1994)(No. 92-1911).

³⁸⁰*Id.*

³⁸¹See *Niagara Mohawk Power Corp. v. New York Dept. of Envtl. Conservation*, 187 A.D.2d 7, 592 N.Y.S.2d 141 (1993), *aff'd* 82 N.Y.2d 191, 604 N.Y.S.2d 18, 624 N.E.2d 146, *petition for cert. filed*, 62 U.S.L.W. 3630 (U.S. Feb. 8, 1994)(No. 93-1285) (holding that states may not consider the effect of a facility on fish and wildlife habitats or recreational opportunities in the certification process because Congress intended such matters to remain within the Federal domain).

Justice Thomas, in his dissent, highlighted In Town of Summerville, 60 F.E.R.C. p. 61,291 (1992).³⁸² In that case, the State demanded that the applicant "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . . , and a residence and storage building."³⁸³ Justice Thomas opined that the CWA § 401 conditions in that case would be sustained under the Court's reasoning in the Elkhorn litigation.³⁸⁴

FERC does not read the Supreme Court's decision so broadly. In a recent "Order Issuing License", FERC interpreted the PUD No. 1 case narrowly.³⁸⁵ It stated that the Court in PUD No.1 "did not reach the issue of whether conditions that might otherwise be appropriate could be deemed unenforceable if they conflicted with our determination of the public interest under the FPA. Further, the Court in no way indicated that conditions that were not related to water quality were lawful."³⁸⁶

³⁸²PUD No. 1, 114 S.Ct. at 1919.

³⁸³In Town of Summerville, 60 F.E.R.C. ¶ 61,291 at p. 61,990 (1992).

³⁸⁴PUD No. 1, 114 S.Ct. at 1919.

³⁸⁵Tunbridge Mill Corporation, F.E.R.C. Order Issuing License, Project No. 11090-000 (Issued July 15, 1994).

³⁸⁶Id. at 9.

One problem with FERC's interpretation is that the Court broadly defined water quality to include uses such as recreation, etc.³⁸⁷ Unless Congress acts, there certainly will be further litigation to resolve the preemption issues.

The Court's decision in PUD No. 1 will also encourage states and environmental groups to look more closely at all federal licenses that might have an impact on water quality. Some have asserted for years that CWA § 401 certifications applied to all federal licenses and permits, including those that result in non-point source discharges into the waters of the United States.³⁸⁸

The Court said states can act to protect their waters from any chemical, physical, or biological alteration of their waters under CWA § 401.³⁸⁹ The Court also said, "the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters".³⁹⁰

³⁸⁷PUD No.1, 114 S.Ct. at 1913.

³⁸⁸Katherine Ransel and Erik Myers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, Va. J. Nat. Resources L., Spring 1988, at 351-353.

³⁸⁹PUD No.1, 114 S.Ct. at 1913.

³⁹⁰Id. at 1914.

Environmentalists believe this language covers pollution from both point and non-point sources.³⁹¹ They believe that CWA § 401 certifications apply to federal logging and grazing permits and any other federal permit that affects water quality standards.³⁹² The Supreme Court's broad language in PUD No.1 certainly supports their assertion.

A Senate bill was prepared and would have been advanced had the Supreme Court ruled for the Petitioners. S. 2093 was designed to amend CWA § 401. Senate Report 103-257, accompanying S. 2093, was prepared by the Senate Environmental and Public Works Committee. The Report explained that S. 2093 would amend § 401 to clarify that a state's authority to certify that a federal license applicant's activities will comply with the state's water quality standards includes the authority to certify that the activities will comply with designated and existing uses. After the Court's decision, this bill appears to be going nowhere.³⁹³ No other legislative bill is currently being advanced in response to PUD No.1.³⁹⁴

³⁹¹Telephone Interview with William Marlett, Executive Director of the Oregon Natural Desert Association (Aug. 1, 1994); Telephone Interview with Katherine Ransel, Co-Director of American Rivers (Jul. 29, 1994).

³⁹²*Id.*

³⁹³Telephone interviews with Benjamin Grumbles, Minority Counsel, House of Representatives Committee On Public Works and Transportation (Jun. 8 and Jul. 29, 1994).

³⁹⁴*Id.*

VII. CONCLUSION

The Supreme Court's decision in PUD No. 1 is certainly not the end of the story. It has already had a tremendous impact on the law dealing with our Nation's waters. The only thing for certain in this murky area of the law is that there are still many hard-fought battles to come.